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Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1973

PITT RIVER TRIBE,	)	
	)	
Petitioner,	)	73-1706
	)	
vs.	)	NO.
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

PETITION FOR CERTIORARI

TO COURT OF CLAIMS

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JURISDICTIONAL ELEMENTS

Attached as Appendix A is the Decision and Opinion of the Court of Claims, which was filed on October 17, 1973.

The opinions of the Indian Claims Commission in the case are not appended because they are voluminous (perhaps 100,000 words) and opinions in companion cases are equally voluminous. The citations to such opinions in this case are 7 Ind.Cl.Comm.815,850; 13 Ind.Cl.Comm.89,369,513; 16 Ind.Cl.Comm. 631,672. The citations in companion cases are 1 Ind.Cl.Comm.149,358,366; 4 Ind.Cl. Comm.147; 6 Ind.Cl.Comm.86,666,673a,674, 677a, 678,680a; 8 Ind.Cl.Comm.1, 11, 39a 194c.

The Order Extending Time to file this Petition until March 16, 1974 was signed on January 10, 1974 by Chief Justice Warren E. Burger.

Jurisdiction of this Court is derived from 28 U.S.C. 1255 and 25 U.S.C. 70s(c).

QUESTIONS PRESENTED FOR REVIEW

1. Is the appellant entitled to be relieved from the judgment of the Indian Claims Commission under Court of Claims Rule 152(b) because the judgment is void?

2. Is the appellant entitled to be relieved from the judgment of the Indian Claims Commission under Court of Claims Rule 152(b) because of fraud on the Court?

3. Is the appellant entitled to be relieved from the judgment of the Indian Claims Commission under Court of Claims Rule 152(b) for "any other reason justifying relief from the operation of the judgment."

4. Is Rule 152(b) inapplicable because of laches?

5. As to the cause of action under 28 U.S.C. 1505, when did the Statute of Limitations start to run?

6. As to such cause of action, was the Statute of Limitations tolled and for how

long?

7. Is there a violation of the First, Fifth or Ninth Amendments to the United States Constitution by the refusal of the Government and the Indian Claims Commission to permit appellant to change attorneys in a proceeding in which the Indians' opponent is the Government?

8. Has appellant been denied an appeal to the Court of Claims in violation of the Fifth and Ninth Amendments to the United States Constitution?

9. Has appellant been denied due process of law in violation of the Fifth Amendment by the failure to accord appellant a hearing on the question of attorneys' fees?

10. Has there been a violation of the settlement agreement by (a) requiring appellant to pay for the cost of preparing the roll of names to participate in the award, and (b) increasing the size of the

roll, thereby violating the implied agreement that the roll would be the previous roll instead of a much larger roll, and (c) violation of the implied agreement that the judgment would be paid off quickly?

11. Has there been an improper use of the summary judgment procedure by the failure to require the United States to prove facts showing there was "no genuine issue as to any material fact"(Ct. of Cl. Rule #101)?

12. Has the Court of Claims violated the contract between appellant and its attorneys, and violated the law by requiring them to pay the fee, in part, of other attorneys as well?

13. Has the Indian Claims Commission Act been violated by distributing the award among persons who could, by no stretch of the imagination, be considered Indians?

14. Has the Indian Claims Commission Act been violated by distributing the award per capita instead of to the Tribe?

APPLICABLE STATUTES

1. Indian Claims Commission Act, 25 U.S.C. 70, et seq.

2. 28 U.S.C. 1505, which reads as follows:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1964, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States of Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe,

band or group."

3. 28 U.S.C. 2501, which (insofar as is relevant) reads as follows:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * * *

"A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

* * * * *

4. Act of October 7, 1964, 78 Stat. 1033, which (insofar as it is relevant) reads as follows:

"For payment of claims settled and determined by departments and agencies in accord with law, and judgments rendered against the United States by the

United States Court of Claims and United States district courts, as set forth in Senate Document Numbered 101, Eighty-eighth Congress and House Document Numbered 339, Eighty-eighth Congress, $33,309,898, together with such amounts as may be necessary to pay interest (as and when specified in said judgments as provided by law) and such additional sums due to increases in rates of exchange as may be necessary to pay claims in foreign currency; Provided, That no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise; Provided Further, That unless otherwise specifically required by law or by the judgment, payment of interest wherever appropriated for herein shall not continue for more

than thirty days after the date of approval of this Act." (Approved October 7, 1964.)

5. Act of September 21, 1968, 82 Stat. 860, which reads as follows:

"AN ACT

"To provide for preparation of a roll of persons of California Indian descent and the distribution of certain Judgment funds.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Secretary of the Interior shall prepare a roll of persons of Indian blood who apply for inclusion thereon and (i) whose names or the name of a lineal or collateral relative appears on any of the approved rolls heretofore prepared pursuant to the Act of May 18, 1928 (45 Stat. 602) and the amendments thereto

or (ii) who can establish, to the satisfaction of the Secretary, lineal or collateral relationship to an Indian who resided in California on June 1, 1852, and (iii) who were born on or before and were living on the effective date of this Act.

"(b) The roll so prepared shall indicate, as nearly as possible, the group or groups of Indians of California with which the ancestors of each enrollee were affiliated on June 1, 1852. If the affiliation of an enrollee's ancestors on that date is unknown, it shall be presumed to be the same as that of the ancestors' relatives whose affiliation is known unless there is sound reason to believe otherwise. Applicants whose ancestry is derived partly from one of the groups named in section 2(b) of this Act and partly from another group

of Indians in California shall elect the affiliation to be shown for them on the roll.

"(c) Application for enrollment shall be filed with the Area Director of the Bureau of Indian Affairs, Sacramento, California, on forms prescribed for that purpose.

"Sec. 2.(a) The Secretary shall distribute to each person whose name appears on the roll prepared pursuant to the first section of this Act, except those whose ancestry is derived from one or more of the groups named in subsection (b) of this section, an equal share of the moneys which were appropriated by the Act of October 7, 1964 (78 Stat. 1033), in satisfaction of the judgment of the Indian Claims Commission in consolidated dockets numbered 31, 37, 80, 80-D, and 347, plus the interest earned

thereon, minus attorneys' fees, litigation expenses (including the reimbursement of funds expended under authority of the Acts of July 1, 1946 (60 Stat. 348), August 4, 1955 (69 Stat. 460) and July 14, 1960 (74 Stat. 512), a proper share of the costs of roll preparation, and such amounts as may be required to effect the distribution."

6. Court of Claims Rule 152(b), which reads as follows:

"On motion conforming to Rule 51 and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court

to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 151(a)(2). A response to a motion under this paragraph may be filed within 15 days after the motion is served. A reply may be filed within 10 days after the service of the response."

STATEMENT OF THE CASE

The basic facts are to be found in Appendix B, with two additions. One is the Amendment to the Petition and Complaint (App.C). The other is newly discovered evidence which was attached as an exhibit to the REQUEST FOR ORAL ARGUMENT (App.D).

PROCEDURAL HISTORY OF THE CASE

On September 11, 1972 appellant sought to file with the Clerk of the Court of

Claims a PETITION TO INVALIDATE JUDGMENT OF INDIAN CLAIMS COMMISSION AND TO ORDER REOPENING OF CASE. The Clerk, apparently without consulting the Court, refused to accept the document for filing, or even to keep a copy as a record of the effort to file.

On or about October 2, 1972, appellant offered for filing in the Court of Claims a PETITION TO FILE A BELATED APPEAL FROM, OR TO SET ASIDE OR MODIFY A JUDGMENT OF THE INDIAN CLAIMS COMMISSION, together with a letter explaining the filing. The Court treated the letter as (what it said it was not) a motion to the Court to instruct the Clerk to file the document - and on October 10, 1972 denied the "motion". The Court then returned to appellant all copies of the PETITION.

On October 25, 1972 appellant offered for filing in the Indian Claims Commission a PETITION TO FILE A BELATED APPEAL FROM,

OR TO SET ASIDE OR MODIFY A JUDGMENT OF THE INDIAN CLAIMS COMMISSION. Thereupon the Attorney General objected to the filing of the PETITION. Thereupon appellant requested permission to brief or argue its right to file the PETITION. The Indian Claims Commission, on November 1, 1972, denied the request to file and returned to appellant all copies of the PETITION.

On February 2, 1973 appellant filed in the Court of Claims a document with two titles: PETITION TO FILE A BELATED APPEAL, OR TO SET ASIDE OR MODIFY A JUDGMENT OF THE INDIAN CLAIMS COMMISSION and COMPLAINT UNDER 28 U.S. CODE, #1505. The Court ordered the document filed as if it had been titled only under 28 U.S.C. 1505.

Thereafter appellant filed an Amendment to the PETITION and COMPLAINT(App. C).

Thereafter the Attorney General filed a MOTION FOR SUMMARY JUDGMENT (App.N0 and appellant filed a REPLY.

Thereafter appellant filed a REQUEST FOR ORAL ARGUMENT to which was attached newly discovered evidence (App. D).

On October 17, 1973 the Court of Claims granted the MOTION FOR SUMMARY JUDGMENT.

WHY THIS PETITION SHOULD BE GRANTED

Among many Indian Tribes there is restiveness, and even resentment and hostility, because of their belief that the Indian Claims Commission Act has failed to provide the justice which was promised by Congress when it enacted it, and by President Truman when he signed it. It is possible that this case, the Pitt River case, is the most unjust, unfair, and lacking in due process of all Indian Claims Cases.

The Pitt River case must be the only one in which the Government, the Indians' opponent, dictated the Indians' lawyer and insisted that he remain their lawyer even though he fought against his Indian

clients; while they tried desperately to discharge him and hire another.

There is certainly no other case where an Indian Tribe has been unable to file an appeal because the Government would not let them change attorneys in order to obtain an attorney who would agree to file an appeal; and then were barred from Court on grounds of statute of limitations, or laches, for failure to file an appeal.

Of course, there are many cases in which the Indians' experts testified quite differently, as to the value of the land at a particular time, than did the government experts. But there cannot be many cases where the Indians were forced to accept a settlement which valued the land at 40% or less than the minimum price set by statute before the date in question; and where Congress had valued the same land for the date in question at the higher value. (See 25 U.S.C. 653). There certainly is

no case where the normal standards of appraisal of the Indian Claims Commission and the Court of Claims would produce a figure ten to fifty times the amount that the Indians were misled into accepting.

Finally, we venture an opinion that in no other Claims Case have the Courts acted, in effect, to change the name of the Indian Claims Commission to the White Man's Claims Commission, by distributing claims money to persons with less than 1% of Indian blood, and against the violent opposition of the Indians.

If this case is not reviewed it will come back to haunt the Government in the way Congressman Jackson warned against, in reporting out the Indian Claims Commission Act.

> "And let us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every kind, shape and

variety, so that this problem can truly be solved once and for all without coming back to haunt us or our successors in the form of further bills to extend the jurisdiction that this bill would confer on an Indian Claims Commission." (Cong. Rec. (1946), p. 5312.)

* * * * *

"We have come to the conclusion that unless these claims are settled once and for all, we will never settle the Indian problem in the United States." (Cong. Rec. (1946). p. 5314.)

If this case is not reviewed it will simply be shifted on to Congress' back. No Tribe, least of all the Pitt River Tribe, would take this lying down. When a factual hearing is provided (as of course it was not in the Court of Claims) it will be possible to show the attitude of the Pitt River Tribe toward the settlement in dramatic terms, such as wholesale refusal

to file claims, large-scale rejection of the checks, and a sit-in at B.I.A. headquarters in an attempt to keep the checks from being sent out (9-1/2 years after the settlement was said to be approved.)

Now referring specifically to Rule 19(b), the decision below should be reviewed because of the following conflicts with other Courts:

1. Conflict with right to counsel decisions of the Supreme Court.
2. Conflict with other courts of appeal on right to counsel in proceedings under Rule 60(b), Fed. Rules Civ. Proc..
3. Conflict with Hazel-Atlas v. Hartford, 322 U.S. 238.
4. Conflict with other courts of appeal in cases under Rule 60(b), where there has been attorney participation in the fraud.
5. Conflict with Klapprott v.U.S.,

335 U.S. 601.

6. Conflict with other courts of appeal on gross negligence of counsel under Rule 60(b).
7. Conflict with other courts of appeal on other applications of Klapprott.
8. Conflict with Borer v. Chapman, 119 U.S. 587 and U.S. v. Wurts, 303 U.S. 414.
9. Conflict with other courts of appeal on doctrine that fraud tolls statute of limitations.

The following important questions should be settled by this Court:

1. Whether, and how, statutes of limitations or laches are to be applied to Indian Tribes under Rule 60(b), and in general.
2. Constitutional and legal limitations on the power, and the exercise of discretion, to refuse Indian Tribes the right to choose or change

counsel.

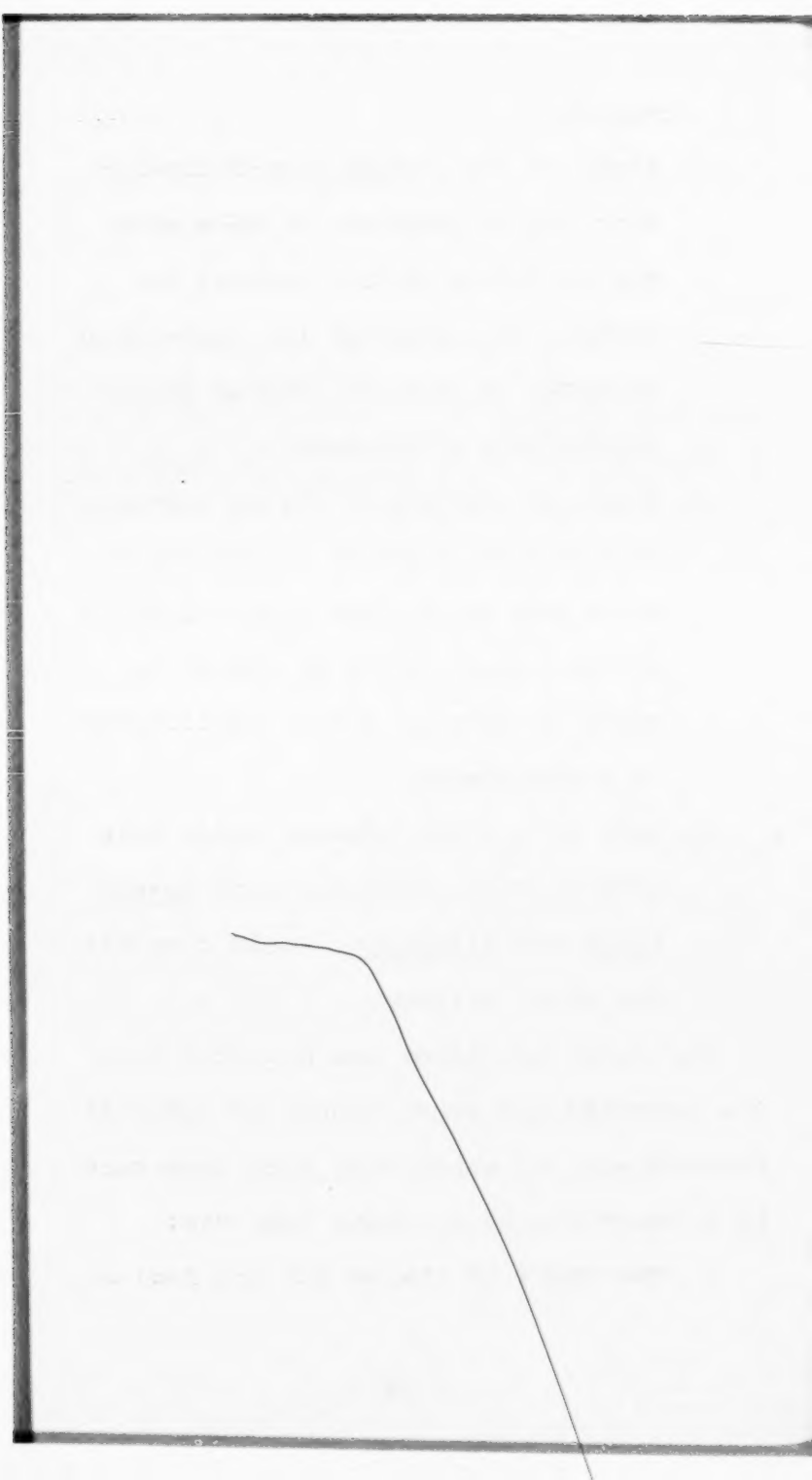
3. Right of the Indian Claims Commission and/or Congress to determine for an Indian Tribe, against its wishes, who comprise its membership in order to vote on, and/or participate in,a settlement.

4. Right of the Indian Claims Commission and/or Congress to declare a white man (with less than 1/2 of 1% Indian blood) to be an Indian in order to vote on and/or participate in a settlement.

5. What is a void judgment under Rule 60(b)? This, together with Hazel-Atlas and Klapprott, would complete the 60(b) trilogy.

The Court of Claims has departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, in these respects:

1. The Court of Claims and the Indian



Claims Commission refused to accept for filing a PETITION TO FILE A BELATED APPEAL OR TO SET ASIDE OR MODIFY A JUDGMENT, thereby denying Petitioner any hearing at all on the Court's jurisdiction in the Court in which it was filed, and making an appeal difficult because of the absence of any record of filing in the court below.

2. The Court of Claims by granting a Motion for Summary Judgment denied an Indian Tribe a hearing upon its substantial allegations meanwhile basing its Opinion on precisely the facts which Petitioner would have denied in a hearing or trial on its PETITION.

3. Denying a claim for failure to appeal within 90 days of the Judgment of the Indian Claims Commission though the Appeal was blocked by the

Government and the Indian Claims Commission by their refusal to permit the Tribe to retain an attorney for the precise purpose of filing an appeal, when the Tribe's attorney refused to file an appeal.

ARGUMENT

The Application of Court of Claims Rule 152(b)

For the sake of clarity, since all the cases cited were decided under Rule 60(b), we will speak of Rule 60(b) instead of 152(b).

The Court of Claims lacks confidence in its own powers and authority - quite in contrast to the cases, and to Moore's Federal Practice which describes Rule 60(b) as "a grand reservoir of equitable power to do justice in a particular case." Our PETITION which, after all,was and could only be, a skeletal statement, shows that our case cries out for justice - much more

strongly than many, many cases in which cases were re-opened, or at least trials held, under the authority of 60(b).

Hazel-Atlas vs. Hartford, 322 U.S. 238, the leading case on what constitutes "fraud upon the court" is also authority for the proposition that an appellate court does have jurisdiction to entertain an independent action. The Supreme Court pointed out that, while reluctant to set aside a judgment, courts have always done so where "enforcement of the judgment is manifestly unconscionable." The key element which establishes fraud upon the court in our case is the responsibility of the Commission to determine whether the settlement was fair. One could even read Hazel-Atlas to hold that an attorney's participation in fraud, standing alone, is enough to constitute fraud upon the court. Attorney's fraud is present in our case in full measure. See Kearney vs. Giddings,

452 F.(2d) 579 and Kupperman vs. Consolidated, 459 F.(2d) 102.

As the settlement agreement constituted a contract with the United States, Hazel-Atlas would be particularly applicable, according to S & E Contractors vs. U.S., 405 U.S. 1.

Our PETITION, treated as an independent action based on fraud upon the court, requires an evidentiary hearing.

A separate ground for reversal of the Court of Claims is that the Judgment of the Commission was void. This Court, of course, does not require the assistance of this writer to learn that the right to counsel, in civil as well as criminal cases, is a constitutional one.

Cases much weaker than ours factually, resulted in evidentiary hearings under 60(b) for denial of counsel. See Winhoven vs. U.S., 201 F.(2d) 174 and United States vs. Plattner, 330 F.(2d) 271, involving

the right to defend oneself. Had the Pitt River Tribe been advised of their right to do so, their second choice position would have been to represent themselves.

Court of Claims decisions recognizing the invalidity of a proceeding which denies counsel are Griffiths vs. U.S., 172 F.Supp. 691 and Shapiro vs. U.S., 69 F.Supp. 205.

Closer to home is Seneca Nation vs. U.S., 122 Ct.Cl. 163 which says:

> "This is because the Nation is entitled to be represented by persons of its own choosing. This would be so, it would seem, independent of the Indian Claims Commission Act, but that Act gives the Tribal organization the exclusive privilege of representing such Indians."

The point that the court makes in Seneca has special meaning for our case. Claim No. 347 was filed on behalf of the Pitt River Tribe by its Tribal Council.

It was a well organized Tribe, functioning mainly through the leadership of the Tribal Council. In fact, it was the Tribal Council that made the contract with Phelps.

Somewhere along the line Phelps and the BIA began to develop another "organization" (probably "concept" is more correct) which was made up of those Indians who, in the opinion of Phelps and the BIA, were entitled to determine whether the Pitt River Tribe's case should be settled. The list (we will call the BIA list) was made up for the purpose of inviting the people to the meeting to vote on the settlement (and later used for the mail ballot). It was not, by any means, the same as the membership of the Pitt River Tribe. Some of the members of the Pitt River Tribe were not even on the BIA list, which included many people who were not considered Tribal members, or even Indians, by the Tribe. They were required to have less

than 1% of Indian blood and, for all anyone knows, were violently anti-Indian in spirit and in act. It was clear that even if, pro arguendo, the BIA list did vote for the settlement, the Tribal Council of the Tribe, which was the claimant and the employer of Phelps, were strongly against the settlement. The record also shows the Tribal membership was strongly against the settlement.

In this situation, the least that the Indian Claims Commission should have done, to carry out the law and the principle of Seneca, was to insist that there be separate legal representation for the Pitt River Tribe and the new conceptual body of Indians (the BIA list) which was being created to vote on settlement and share in the fruits of the Claims case. Leaving aside completely whether or not the Indian Claims Commission had the authority to make beneficiaries of non-members of the

Tribe (who were even hostile to Indians), was there not a clear denial of the constitutional right to counsel? Much less conflict of interest (than in our case) resulted in a voiding of the judgment in Ashe vs. McNamara, 335 F.(2d) 277.

The Supreme Court has held that to provide counsel with a conflict of interest, as between defendants, is actually to deny counsel. Glasser vs. United States, 315 U.S. 60.

The strongest of imaginations is unable to produce a scintilla of explanation or rationalization as to why the Pitt River Tribe should not have been permitted to change attorneys. This was not in the middle of the trial, as the liability issue had already been determined. It would not have required a single day's delay in the proceedings. Assuming some reason to deny counsel prior to the judgment, why should the Tribe have been denied

the right to change counsel to carry on an appeal? See Dowd vs. Cook, 340 U.S. 206.

To realize how horrendous was the Government's conduct vis a vis the right of appeal, see the letter-decision from the BIA Commissioner to Melvin Belli (App.D). The letter written two months after the judgment (with almost a month of appeal time remaining) says that, since there has been a judgment, "we see no tribal interest which could be served by approval of the proposed contract."

In support of our PETITION we have (1) the voidness of the Judgment, (2) the application of Hazel-Atlas, and (3) the Magna Carta for disadvantaged and abused litigants, Klapprott vs. U.S., 335 U.S.601. The language in the opinion of Klapprott is of course general - it would have to be. The generality of Klapprott fits our case. So also does its specificity. As similarly the Tribe was operating in a

strange and hostile world. They needed a lawyer, if anybody does, and they certainly needed a lawyer who was on their side and not against them.

They were called upon to vote on a settlement proposal which two Congressmen told a Congressional Committee they (the Congressmen) did not understand. This writer, after puzzling over it for years, still does not understand it. They were dependent upon Government assurances in key areas such as: What was their land worth in 1853? They were dependent upon lawyers for the answer to such practical questions as, "Could our case be lost if it were appealed?" or "How long will it take for a final decision."

They were within the toils of the BIA which made a voting list without regard for their knowledge and their views. The BIA determined what written argumentation would be sent out in the mail and left

out completely the Tribe's arguments against the settlement. The BIA sent out many more ballots than it had names for. The Tribe never was able to get the BIA agents crossexamined, although there was evidence that they violated normal voting practices by, for example, putting ballots in voting boxes.

We could go on endlessly with such illustrations of a Klapprott-like situation. In doing so we must go outside the record because the improper use of the Summary Judgment device makes it impossible for the Tribe to take full advantage of Klapprott. Certainly the detail of a trial transcript is not appropriate in a 60(b) Petition.

A most interesting case arising under 60(b) parallels ours. It too involved a lower court which refused to set aside a judgment; and the Government was a party; and an issue of what land was worth; and

an erroneous view of what the land was worth. See U.S. vs. Gould, 301 F.(2d) 353 for what happens when everything is reversed, and the Government, not an Indian Tribe, is on the wrong end of the stick.

Another interesting case is Fleming vs. Huebsch, 159 F.(2d) 581. Here too the trial court was reversed for failure to set aside the judgment. As in our case it was a consent judgment. Even though the moving party had the services of counsel (working for him - not against) he was able to get the judgment set aside because "defendant assumed he was being correctly advised by informed Government officials". The most interesting case we have found is Naples vs. Maxwell, 368 F.(2d) 219; which reversed the District Court for not vacating an habeas corpus order. The gravamen of the Government's claim was that the concession of the Assistant Attorney General

that the habeas corpus should issue was unauthorized. So in our case, if the Attorney General simply filed a paper declaring that when Ramsey Clark negotiated the settlement he was not authorized to do so, the judgment would be set aside.

One of the most tragic things about the settlement in our case was the negligent, if not fraudulent, exploitation of the thoughtfulness,respect and veneration of Indians toward their old people. If there was one single factor which accounted for the actual, or apparent, affirmative vote for the settlement, it was the claim that so many old people would go to their deaths unpaid if there were no settlement, because it would take ten years to litigate, whereas a settlement could be paid off in less than a year. The checks were not sent out for nine and a half years.

The Indians were also promised that the amount of money per person would be

calculated by dividing the total number on the roll (prepared for the vote) into the settlement figure. But Congress chose to make a new list, twice as long, meaning half as much money per Indian as they had been promised.

With diligent search we have been able to find only two cases which involved an attempt to set aside a judgment because of a violation of a contemporaneous agreement. In each case the judgment was set aside. See L.M. Leathers Sons vs. Goldman, 252 F.(2d) 188 and Kelly vs. Greer, 334 F.(2d) 434. In neither of these cases was there the additional injustice which is present in our case. Not only did the Indians have to wait 9-1/2 years for their settlement checks, they had already waited 110 years before the settlement - and no interest was paid for the 110 year wait.

Another principle which quite naturally developed in the 60(b) decisions is that

the discretion of the lower court is reviewed more critically where the judgment was not on the merits. Spann vs. Commissioners, 443 F.(2d) 715, 716. Where, as here, there was no decision on the merits; and where, as here, and as in Klapprott, there was not one but a congeries of facts producing the injustice, the summary judgment procedure is particularly inappropriate. At least the use of a demurrer or motion to dismiss, though it may result in loading up the complaint with a plethora of facts (contrary to the recommended type of pleading), offers plaintiff the opportunity to produce more facts to come up to the level (whatever that is) which will bring Klapprott into play. On the other hand, the Government by moving for summary judgment (without any factual showing), and the Court of Claims by granting it, denied the Pitt River Tribe the opportunity to take advantage of Klapprott(assuming,

of course, which we do not concede, that the allegations in our PETITION and COMPLAINT did not amount to a prima facie case for the application of Klapprott).

Let us now discuss the separate attorneys' fee judgment, which was obtained without any notice to the Tribe, and after a hearing of which the Tribe had no notice. Critical as the Tribe was of its lawyer's misconduct, large as was the total fee (over $2,600,000 for all the lawyers), close as the 9% allowance was to the 10% maximum fee under the attorney-contract, with the case only partially tried, it should be clear that the Tribe would have had something meaningful to say on the fee question, if given notice of the hearing.

Yet in violation of due process, Indian Claims Commission procedures, and the clear implication of the attorney-contract no notice was given to, nor was there an appearance for, the Tribe except by

attorney Phelps. The insensitivity of the Indian Claims Commission is demonstrated by their failure to even inquire concerning the absence of the Indians at the attorneys' fee hearing. The outrageousness of the fee is shown by the fact that the Assistant Attorney General, who should not even have been participating, felt called upon to point out how duplicative were the lawyers' efforts and how much of their time (and the fee) was devoted to fighting against each other instead of the Government. He pointed out that these internecine fights only determined which attorney got a fee, not which Indians got an award. Under Klapprott the Attorneys' fee judgment should be set aside. It was also void as a violation of the Fifth Amendment, Eastport v. U.S., 372 F.(2d) 1002.

The Court below declares the allegations in the petition insufficient under

28 U.S.C. 1505. It cites no authorities but relies upon two things: one, its own "logical" analysis and, two, the findings of the Commission.

Examine the first full paragraph on page 8 of the Decision. Since this is a motion for summary judgment and the Government produced no factual affidavits, the Court has to be saying that, as a matter of law, no government attorney can commit fraud. This would have been arrant nonsense, even before Watergate. The Court further points out that the protection against fraud of the other party's lawyer is your lawyer. This ignores the two claims we can prove, that our lawyer was not acting as our lawyer; and furthermore (as Senator Taft used to say) he was "in cahoots" with the other attorney, and the various Government representatives cooperated with our lawyer to put over the settlement.

Then the Court proceeds to pull itself

up by its own bootstraps. In arguing that we have no basis to set aside the judgment, it uses that Judgment, and its findings, which was procured and modeled by the very improper, illegal and unconstitutional acts of which we complain. To use a crass illustration, if one were seeking to set aside a judgment or verdict because either the judge or the attorney had been drunk, would the judgment, verdict or finding be useable to establish that 60(b) was not applicable.

If there was fraud on the Court as we claim, then the Findings of the Commission prove nothing because they resulted from the fraud. Similarly, if the Tribe was denied counsel in its fight against the settlement, the findings which resulted from its counsel-less condition prove nothing.

The Application of 28 U.S.C. 1505.

The Court below does not cite any

authorities, or apparently make the claim that our PETITION and COMPLAINT does not state facts sufficient to constitute a violation of 28 U.S.C. 1505. But out of an abundance of caution we will specify our authority, and answer an unasked question as to whether this is a tort actior.

We will discuss separately each theory upon which our 28 U.S.C. 1505 cause of action is based.

Fair Dealings.

One root of plaintiff's claim is the fiduciary duty owed to them by the United States. This duty, expressly recognized by Congress in 1 Stat. 50, has been likened unto the relationship of a guardian and ward. Worcester v. Georgia, 31 U.S. 350, United States v. Kagama, 118 U.S.228, Rockbridge v. Lincoln, 449 F.(2d) 567.

The United States expressly assumed fiduciary duties toward the Indian people of California in the Treaty of Guadalupe

Hidalgo, 9 Stat. 922, February 2, 1848, the first section of the protocol annexed thereto having committed the United States to the maintenance and protection of the inhabitants of California, including Indians, in the free enjoyment of their liberty, property and religion. Congress explicitly recognized the existence of a fiduciary duty and relationship between the United States and Indian tribes, bands or groups in the original version of what is now 28 U.S.C. §1505. In the original version (Act of August 13, 1946, 60 Stat. 1055, c. 959 §24), Congress stated the following:

> "Provided, however, that nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups."

This language was deleted from the present language of 28 U.S.C. §1505 as un-

necessary, "since the provision conferring jurisdiction cannot in any view alter the relationship of the Government with its Indians." 2 U.S. Code, Cong. Serv. 1269, 81st Cong.1st Sess. 1949,Senate Report No. 303.

Where there exists a fiduciary relationship such as that present in the case at bar, there is implied by the laws upon which that relationship is founded a promise to pay due compensation for pecuniary damages suffered as a result of the breach of the fiduciary duty of the United States. A suit against the United States for damages sustained by reason of a breach by the United States of its trust obligation under federal law "is within 28 U.S.C. §1491 as a claim founded upon an Act of Congress and for damages in cases not sounding in tort." Mason vs. United States, 461 F.(2d) 1364, 1374.

25 U.S.C. §81 requires that contracts

with Indian groups, including attorneys' contracts, be approved by the Secretary of the Interior and the Commissioner of Indian Affairs. 25 U.S.C. §82 provides that before compensation is paid to an attorney, the Secretary of the Interior and the Commissioner of Indian Affairs shall determine whether the obligations of the contract have been fulfilled.

In Udall v. Littell, 366 F.(2d) 668 (D.C.Cir.1966), cert.den. 385 U.S.1007, reh.den. 386 U.S. 939, the Secretary of the Interior cancelled the contract of an attorney whom the Secretary found was acting in violation of a contract with an Indian Tribe. In upholding the Secretary's power to terminate the contract, the Court, per Burger J., stated:

> "Moreover, the Secretary is required to investigate an attorney's performance to determine whether he has fullfilled his contract before any payments are

made under it. It can hardly be thought that Congress intended the Secretary would pay an attorney from tribal funds held in trust if the amounts were unreasonable or if the lawyer had not been faithful to the clients' interests, or was guilty of any other significant misconduct."

Quite relevant are decisions of the Court of Claims in Klamath v. Modoc Tribes v. United States, 174 Ct.Cl.483, and United States v. The Oneida Nation, 477 F.(2d)939.

We call attention to the speech of President Washington, quoted in The Oneida Nation:

"The general Government will never consent to your being defrauded, but will protect you in your just rights."

True enough, this reference was to protection from others, not the Government. But can this really make any difference?

Denial of an Attorney.

See the discussion of 60(b) on this subject.

Violation of the Due Process Clause of The Fifth Amendment

The Supreme Court has been flexible and imaginative and profound in its protection of the property rights of whites against Government intrusion or unusual takings. U.S. v. Causby, 328 U.S. 256; U.S. v. Dickinson, 331 U.S. 745; Portsmouth v. U.S., 260 U.S. 327; U.S. v. Lynch, 188 U.S. 445. This should be sufficient authority for our case.

We are, of course, claiming a violation of two different aspects of the Fifth Amendment. The one just referred to is the "deprivation of property" aspect. The other aspect is procedural due process. The classic statement of the Supreme Court on this subject is to be found in Holden v. Hardy, 169 U.S. 366, as follows:

"...it is certain that these words imply a conformity with natural and inherent principles of justice."

To judge the importance of the violations we claim for, it is important to consider this fact: When the judgment was enforced the Indians were left with an amount of money which no one would consider adequate either from the standpoint of what their land was worth, or in terms of their ability to purchase land -- than which nothing is more important to Indians. By this settlement something even more important was lost -- the opportunity to get back some of their ancestral land. Short of the finality of the judgment they could have perhaps, like the Taos Indians and the Yakima Indians, have obtained the return of a portion of their ancestral land. Both the Taos and the Yakima were in the position of having an unpaid judgment of the Indian Claims Commission at the time

Congress and the President, respectively, conveyed the land to them, instead of the money.

Violation of the Promise to Pay Promptly.

See the discussion of 60(b) on this subject.

Deduction of Cost of Preparing the Roll.

Upon analysis this is like charging someone for the whip to beat him with. This money was expended, without any necessity, since the BIA already had, they felt, a representative enough list to vote on the settlement. The result was to delay for nine and a half years what could have been done in a week, and to dilute each Indian's payment by approximately half. Neither the Settlement Agreement which was voted upon, nor the Judgment, provided for any deduction from the $29,100,000 Judgment for this purpose.

Deduction of Amount Paid to Persons Added to Roll After Settlement.

This was not agreed to in the Settlement, nor is it contained in the Judgment. It also violated the implied-in-fact agreement that the amount of money to be distributed would be determined by the existing roll.

Payment Out of Judgment to Whites.

This was never agreed to in the Settlement vote nor was it contained in the Judgment. Moreover, it violated the implied-in-fact agreement that the amount of money to be distributed would be determined by the existing roll.

We are in a nether-nether land, when we try to apply the U.S. Constitution to the Government's procedure on Indian claims. Through this crowded, complicated history of claims statutes and court decisions, there has always been the unstated assumption that an Indian is different from a white man. Though oftentimes definitions vary between full blood and (perhaps) 25%

as the lowest allowable percentage, no one has ever claimed that anyone with less than one-eighth of Indian blood would be considered an Indian, especially if he was not living on a reservation as an Indian. We have not made any study, but we doubt that another case can be found in which so much dilution was permitted against the strong opposition of the Tribe.

Assuming an Indian parent with a white spouse had a child in 1854, and assuming one of the children parented a child at age 18, and continuation of such a process, then a child born in 1962 would be only 126th Indian, yet eligible to participate in this judgment.

Many Indians not full-blooded have left their Indian ways and become part of the whitemen's world, and their children, too, to all intents and purposes, are white. Many such apparently remembered their Indian blood only when they heard that by simply

signing their name to a claim form they could, without publicity, receive a sum of money.

If there is any constitutional protection of Indians in a claims case this must be the case that demonstrates it.

Loss to the Tribe From The Nine and a Half Years' Delay in Payment

There was an implied-in-fact agreement that the Judgment would be distributed without delay.

Is Our Claim, or Any of It, Founded Upon a Tort?

This question is not asked by the Court below, but it was raised in the companion (Andrade) case by the Government.

The devastating answer to the "tort" argument is United States v. Atlantic Dredging, 253 U.S. 1. The damages awarded were not based upon any contract with the Government, but were simply the damages caused by the misconduct of the Government.

There was no reformation of the contract. The Supreme Court decision in Atlantic Dredging can be given either of two interpretations. Both are acceptable to us for our case. One, there is a judgment on a tort theory with a tort measure of damages. Two, the contract is reformed, so as to add to the Government's payment the amount of loss suffered as a result of the Government's negligence. Applied to our case, either we are awarded the damages that the Government's tortious acts caused, or the settlement stipulation and judgment is reformed to add on these same damages.

Not long after Atlantic Dredging came Freund v. U.S., 260 U.S. 60, where the Court allowed plaintiff the same damages that he would have been entitled to if he had sued on a tort.

This is, of course, a recurrent problem for the Court of Claims. Invariably it treats a tortious breach of contract as

not a tort. Chain Belt v. U.S., 115 F.Supp. 701. Chain Belt, in fact, cites a case that is very close to ours on the facts; Chippewa Indians v. U.S., 91 Ct. Cl. 97.

A case which demonstrates how far the Court of Claims has gone to accept a suit which would appear to most lawyers to be sounding in tort is Heyer v. U.S., 140 F.Supp. 409. Notice the Court's strong emphasis on the fraud (page 413). What is very significant about Heyer is that, unlike Atlantic Dredging and Freund, there was never a contract between the Government and the contractor.

Just in case the Attorney General replies to this Memorandum and makes something of the repetition of the use of the word "fraud" in our PETITION, we refer the Court to Heyer Products v. U.S., 177 F.Supp. 251, which almost amounts to an entrapment by the Court of Claims to induce plaintiff to plead its case in terms of fraud.

Statute of Limitations.

The decision of the Court of Claims asserts that the statute appropriating the money started the statute of limitations running. There are several answers to this proposition.

One, this is within the 90-day appeal period.

Two, the Indian Claims Commission Act does not say this. It says that the payment (not the appropriation) "shall be a full discharge of the United States."

Three, the Appropriation Act (78 Stat. 1033) does not say this. It says, "no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise."

Four, under decisions of the U.S. Supreme Court and the Court of Claims the claim had not sufficiently ripened so that plaintiff was entitled to file suit on it.

The Supreme Court has put the matter thus:

> "It cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." Borer v. Chapman, 119 U.S. 587, 602.

Had plaintiff filed suit before September 21, 1968 (when Congress decided who, if anyone, would get the money) it could have been premature. In fact, in the companion (Andrade) case the Attorney General argued that the individual Indians had no standing until the payment roll was made.

As the Court said in Peoria Tribe v. United States, 169 Ct.Cl.1009,

> "how the award is to be paid and precisely who can participate in an award to the Peoria Tribe on behalf of the nation are questions for Congressional and Administrative deter-

mination."

In our case there was no assurance prior to September 21, 1968 that there would be any payment at all to plaintiff or any of the members of the Tribe. See Oceanic v. U.S., 165 Ct. Cl. 217, 225.

A quite relevant example of the timing of the determination as to whether any Indian Tribe, or individual Indians, share in a Judgment, and if so which, is furnished by The California Jurisdictional Act. (25 U.S.C. 651 et sequ.) and subsequent legislation. Note that 25 U.S.C. 656 provides that "no part of said judgment shall be paid out in per capita payments to said Indians." This is reversed by 64 Stat. 189 which distributed $150 per capita, and by the statute in our case (82 Stat. 860) which completed the reversal of 25 U.S.C. 656 by distributing the balance to individual Indians.

An almost identical problem was dealt

with by the Supreme Court in U.S. v. Wurts, 303 U.S. 414. A statute provided that the statute of limitations would start running against the Government "after the making of the refund." It was claimed the statute started when the Commissioner allowed the refund. The Supreme Court said,

> "The Commissioner's signature on a schedule of overpayments does not finally establish a claimant's right to a refund and does not preclude further investigation and consideration of the claim. The Commissioner could later take his signature from the schedule and, as pointed out by this Court, might -- even after a check was signed and mailed -- cancel the payment and revoke the authority of payment erroneously made."

Five, the Statute is tolled by inability to obtain the necessary facts. We read Standard-Vacuum v. United States,

339 U.S. 157 as saying that even a large corporation, with its resources, would be permitted to toll the statute if it could prove that it could not get the necessary facts required to bring an action. The Pitt River Tribe was in a much more difficult position than Standard Vacuum.

Six, the Tribe was under legal disability for the entire 6-year limitations period because it could not file suit without an attorney, and the Secretary of the Interior and the Commissioner of the BIA forbade it to have an attorney.

Seven, between the time when the Appropriation Act was passed (1964) and the Distribution Act was passed (1968) the proper place to make their (Pitt River) claim was Congress. This was where they went when Congress held hearings on the Distribution Act; and this is where they argued for the position which, being rejected by Congress, is asserted in this

PETITION and COMPLAINT. It would seem to us that, therefore, the theory of U.S. v. Lippitt, 100 U.S. 663, is applicable. Also see U.S. v. Taylor, 104 U.S. 216; U.S. v. Louisiana, 123 U.S. 32; United Contractors v. United States, 268 F.(2d) 585.

Eight, the Statute of Limitations is not applicable to Indians, at least where the United States is a defendant, and certainly where fraud of the Government is charged, and positively where the Government within the period of the statute denies counsel to the Indians.

Nine, the statute has been tolled by fraud. See Spevak v. U.S., 390 F.(2d) 977, and Mulholland v. U.S., 165 Ct.Cl. 231. Lacking fraud, the statute is still tolled where an individual Indian does not know of his trustee's default. Chisholm v. House, 183 F.(2d) 698.

Let us now discuss the question of statute of limitations on our "attorney's

fee" claim and our "expenses of preparing the roll" claim. When did the statute start running as to these? The Indians were never given any notice of the "attorney's fee" judgment or the payment to the attorneys. It is apparently not claimed that the statute of limitations has run on the "expenses of preparing the roll" issue.

Laches.

Although "laches" is a factual question, both as to reasonableness of the delay and prejudice to the Government, and though no affidavit was filed by the Attorney General, and though no hearing was accorded plaintiff on this issue, the Court below apparently finds laches to exist. The case being in this posture, authorities do not seem required. If authority were required we would refer the Court to Powell v. Zukert, 366 F.(2d) 634 on the proposition that poverty which results in inability to

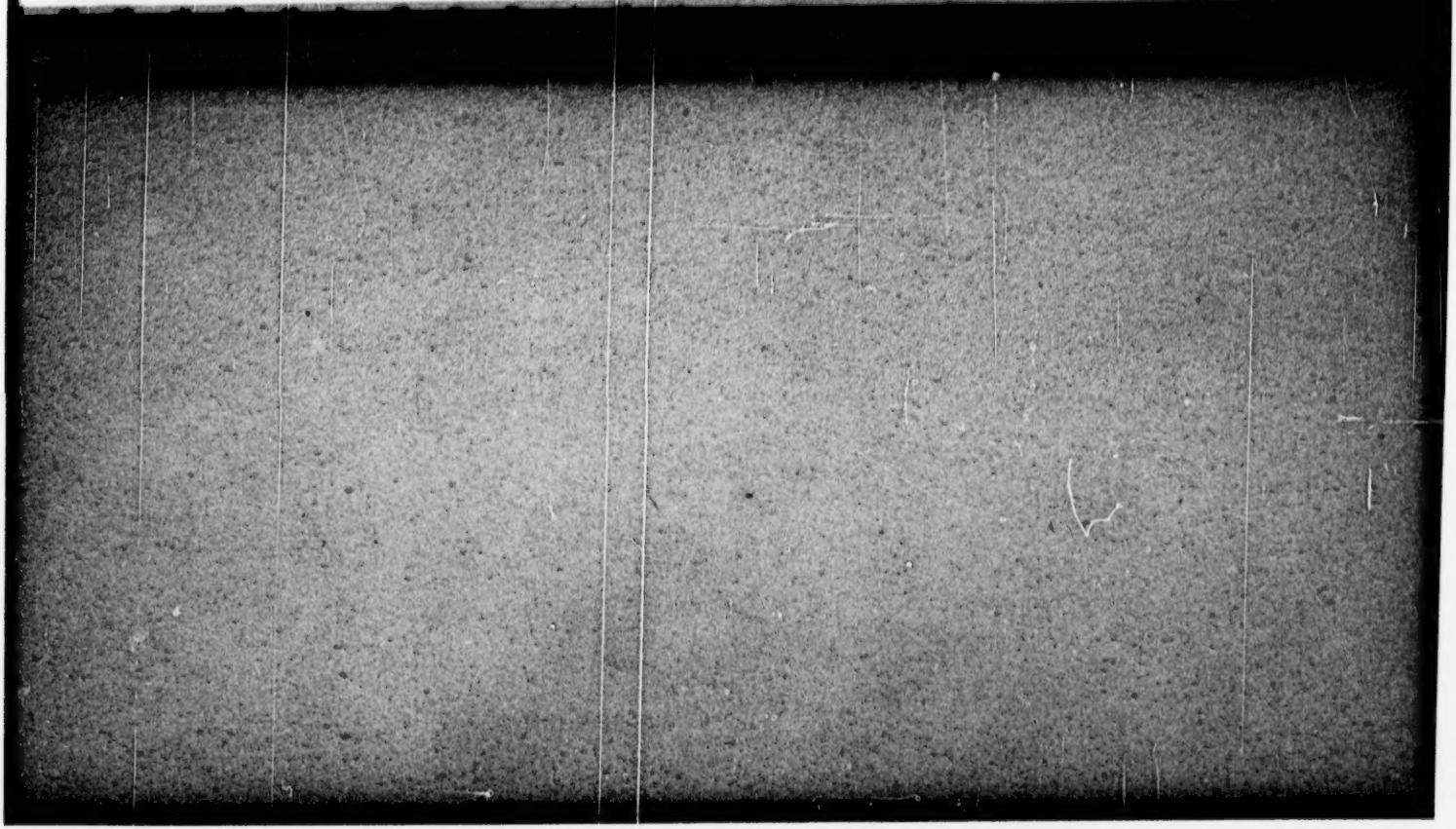
get a lawyer produces a delay which is reasonable; and also on the proposition that the Government must prove prejudice in order to assert "laches."

Considering that the Government prohibited the Tribe from getting a lawyer (where approval of the lawyer was required by the Indian Claims Commission), leaving the Tribe with the necessity of finding a lawyer who would take on thousands of hours of work without fee, excluding the Tribe from access to courts on the ground of laches, sounds just like Anatole France:

> "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

Respectfully submitted,

Aubrey Grossman



SUPREME COURT, U. S

MAY 16 1974

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1973

PITT RIVER TRIBE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 73-1706

APPENDIX TO

PETITION FOR CERTIORARI

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In the United States Court of Claims

No. 347-72
No. 47-73

(Decided October 17, 1973)

DAN ANDRADE (1), JOE CARRILLO (2), INDIVIDUALLY, AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED v. THE UNITED STATES

PITT RIVER TRIBE, ET AL. v. THE UNITED STATES

George Forman, attorney of record for plaintiffs, (No. 347-72). *Bruce R. Greene*, *Aubrey Grossman*, *David Getches* and *John E. Echohawk*, of counsel.

Aubrey Grossman, attorney of record for plaintiffs, (No. 47-73). *Bruce R. Greene*, *David Getches*, *John E. Echohawk* and *George Forman*, of counsel.

Ralph A. Barney, with whom was *Assistant Attorney General Wallace H. Johnson*, *for defendant* (in both cases).

Before COWEN, *Chief Judge*, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*.

ON DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

PER CURIAM: In September of 1972, attorneys for the above petitioners attempted to file in this court petitions which sought, in effect, to overturn a judgment of the Indian Claims Commission, 13 Ind. Cl. Comm. 369 (1964). Petitioner Andrade sought relief under 28 U.S.C. § 1491 for breach of a

522-358—73

fiduciary duty on the part of the United States. That petition (No. 347-72) was accepted for filing by the clerk of the court on September 11, 1972. Petitioner, Pitt River Tribe, attempted a belated appeal of the Indian Claims Commission judgment. This petition did not meet the requirements set out in the Rules of the court and was not accepted for filing. After the Pitt River Tribe, petitioner, failed in an attempt to have the Commission reopen its proceedings, it filed an amended petition in this court which included a prayer for relief under 28 U.S.C. § 1505. This petition was accepted for filing as to relief under § 1505 only, on February 2, 1973 (No. 47-73). See order of February 2, 1973. A request for consolidation of the two petitions was denied without prejudice by trial judge Schwartz on March 2, 1973. The Government has moved for summary judgment in both cases. The two cases will be dealt with in this one opinion because of the similarity of the claims made, and relief sought.

The case before the Commission involved nine dockets (Nos. 31, 37, 80, 80-D, 176, 215, 333 and 347). All were claims for compensation on behalf of various groups of California Indians. In all of the dockets the Commission rendered interlocutory judgments in favor of the Indians as to title and dates of taking. Thereafter, proceedings before the Commission were suspended while the Justice Department and the attorneys for the Indians entered into negotiations on a possible settlement. On July 31, 1963, a proposed settlement was reached whereby the Indians would consolidate all claims and release them in return for the sum of $29,100,000. This was agreed to, subject to approval by the Indians and the Bureau of Indian Affairs. A notice of the proposed settlement was sent to all those affected Indians enrolled under an Act of May 18, 1928, 45 Stat. 602. Though a vociferous minority opposed it, the settlement was approved in a series of votes and mail ballots by a majority of the Indians and thereafter, on May 7, 1964, by the Commissioner of Indian Affairs. Opposition was particularly active in the Pitt River Tribe which, however, voted approval by a small margin. In other tribes, approval was by large margins. The Commission then held hearings on a motion for entry of final judgment on the above dockets and on July 20, 1964, approved the settlement and with extensive findings of fact issued a final judgment, 13 Ind.

Cl. Comm. 369. The judgment was reported to Congress and sums were appropriated for the payment of the judgment. Act of October 7, 1964, 78 Stat. 1033.

Petitioner Andrade asserts that the United States had at the time of the above proceedings and continues to have a fiduciary duty toward him because he is an Indian and specifically as the result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922, February 2, 1848. Petitioner alleges that the United States breached its duty by allowing attorneys from the Department of Justice to mislead the Indians as to the value of the land at issue in the above settlement and as to the operation of the settlement. Petitioner also views the approval by the Secretary of the Interior of the Indians' attorneys as a warranty of their good faith efforts on behalf of their Indian clients. We are told that, in fact, these attorneys worked to their clients disadvantage by seeking the above settlement and by misleading the Indians into accepting it. Finally, petitioner alleges that the Indian Claims Commission failed in its duty under the Indian Claims Commission Act to properly oversee the settlement of the dockets. Petitioner avers that there were irregularities in the voting procedures, that there was insufficient notice of the hearings on the proposed settlement, and points to what he alleges to be excessive legal fees awarded by the Commission to the Indian attorneys as evidence of a breach of the Commission's duty.

Petitioner Pitt River Tribe makes a number of the same assertions made in the Andrade petition. We are told that the attorneys for the United States misled the Indians as to the value of the property in question and that the BIA and the Commission failed to assure that the Indians understood what the settlement offered and how it would operate. The Pitt River petition goes on to describe with particularity how attorneys for the United States misled the Indians as to the amount of money each individual Indian would receive, and the great saving in time which a settlement would permit as compared to further litigation. We are also told that the election procedure was subverted by the attorneys for the Indians presenting a series of reports biased in favor of the settlement, by the BIA sending out misleading information about the settlement as well as allowing too many mail ballots to be used, and by the Commission allowing the elec-

tion procedures to be changed to include a mail ballot after a vote by the Pitt River Tribe had negatived the settlement. The petitioner asserts that the hearings on the proposed settlement were not conducted fairly. Because the petitioner was denied the right by the BIA to fire its original attorney and hire the attorney of its choice, it alleges that it was unable to oppose the settlement successfully, and that it was specifically denied the right to cross-examine those who spoke in favor of the settlement. Since it was allegedly tied to an attorney who was not working in its best interest we are told that petitioner was unable to challenge the proposed settlement at the Commission or to seek to overturn it in this court. In fact it was only when the present attorneys for the petitioner agreed to seek relief, without compensation, that the Pitt River Tribe could attempt to challenge the settlement. Finally we are told that under the circumstances the fees allowed to the attorneys involved in the settlement were exorbitant, and were awarded from the settlement without any notice to, or opportunity for comment by, the Indians.

Related to the settlement but not tied to its being overturned are two other claims of the Pitt River petitioner. We are told that those Indians who voted on the proposed settlement were led to believe that they would each receive a portion of the settlement based upon the Roll of 1928. This relatively large share of the total was allegedly an important factor in the settlement gaining acceptance. However, after the settlement, Congress established a new Roll which included more persons to share in the settlement. Act of September 21, 1968, 82 Stat. 860. This action by Congress was, we are told contrary to explicit promises made by Government Agents prior to the voting on the settlement and operated to divest the Indians of their proper share of the settlement. The above Act also provided that funds from the settlement should be used to make up the new Roll. The deduction from the settlement of the alleged amount of $475,000 to pay for the Roll is challenged as never having been agreed to either in the settlement nor anywhere else, and as being a taking without compensation. These last claims will be dealt with separately.

Defendant asserts in its motions for summary judgment that this court lacks jurisdiction under the Tucker Act and

28 U.S.C. § 1505 to entertain these petitions. Even if the court did have jurisdiction over the claims made, we are told, they would be barred by the six year statute of limitations and/or by *res judicata*. For purposes of these cases, we do not accept defendant's first contention as to the jurisdiction of the court. We agree with certain exceptions with defendant's second contention, and therefore hold that petitioners' claims must be dismissed.

Whether or not this court can entertain these petitions in their attack on the Commission judgment raises the question of the extent of our authority to entertain an "independent action" to reopen the case, under Rule 152(b). Petitioners' claims would normally be barred by *res judicata* and by 25 U.S.C. § 70u, which establishes a final determination of the Commission, filed with the Congress, as having the same effect as a final judgment of this court. *Assiniboine Tribe* v. *United States*, 128 Ct. Cl. 617, 633, 121 F. Supp. 906, 913, *cert. denied*, 348 U.S. 863 (1954). The only possible loophole through which petitioners can now get into court is under the provisions of Rule 152(b). This Rule is identical to Rule 60(b) of the Federal Rules of Civil Procedure. As explained in 7 MOORE'S FEDERAL PRACTICE, § 60.18 [8]:

> * * * Two types of procedure to obtain relief from final judgments are specified in amended 60(b). One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or *independent* action to obtain relief from the judgment, which action need not necessarily be commenced in the court which rendered the judgment.

After providing for reopening cases within one year for mistake, newly discovered evidence or fraud, or within a reasonable time for "any other reason justifying relief", the Rule states:

> * * * This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. * * *

As made clear from the above paragraph in MOORE'S it is under this last clause of the Rule that the petitioners must seek relief. For convenience, we refer to the action as under Rule 152(b) though technically the language shows the Rule

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does not purport to confer jurisdiction, but only to reaffirm the continued existence of a form of relief that existed previously.

Defendant invites the court's attention to *Carney* v. *United States*, 199 Ct. Cl. 160, 462 F. 2d 1142 (1972). In that case we held that we could not, under Rule 152, reopen a judgment of a United States District Court, though referring to instances when we had reopened our own decisions. We stated that a court entertaining an independent action to reconsider a suit in a District Court must be one having equity jurisdiction and must have had jurisdiction over the subject matter, had there been no previous judgment. For the purposes of these cases, we assume without deciding that under 28 U.S.C. § 1505 we can nevertheless entertain an independent action by a tribe to reconsider a judgment of the Commission, and one by Indian individuals under § 1491 as construed in *Hebah* v. *United States*, 192 Ct. Cl. 785, 428 F. 2d 1334 (1970).

Plaintiffs have not helped us much in determining whether *Carney* is fatal to their claims. Our own reasoning tells us the matter is not free from doubt. It must be remembered that the Commission was expected to have a relatively short life. It would not have been able to reopen its own judgments after it had ceased to exist, when it was discovered that such judgments should be overturned, for, *e.g.*, fraud on the Commission. It is arguable that Congress intended this court to perform that function, since to assume otherwise would be to make Rule 152(b) relief unavailable to Indian litigants. Such a result would depend also on Section 70 u of the 1946 Act. Under that Section of the Act, a judgment of the Commission when reported to Congress shall have the effect of a final judgment of this court. Since we could reopen our own judgment, it might follow we could reopen a judgment which has the effect of one of ours.

The second requirement set out in *Carney* is that the court entertaining the "independent action" must have jurisdiction over the subject matter apart from the bar of former adjudication. Under 28 U.S.C. § 1505 this court can entertain actions brought by Indian tribes for claims which accrued after 1946. Activity which would render a judgment of the Commission subject to attack on the grounds spelled out in Rule 152(b) would necessarily have taken place after 1946. As stated in

Hebah, supra, 1949 would be the earliest date for individual claims.

If we reason that we can entertain an action under the independent action clause of Rule 152(b), that does not dispose of the cases before us. The operation of the Rule requires that the moving party act with diligence. Though there is no express time requirement in connection with an "independent action", the doctrine of laches applies. Precisely how gingerly a court should proceed when entertaining an independent action to set aside a judgment is expressed in 7 MOORE'S FEDERAL PRACTICE, § 60.37 [1]:

> Under circumstances which render it manifestly unconscionable that a judgment be given effect, an independent action will lie to enjoin its enforcement because of newly discovered evidence; but properly the rules which limit equitable interference on this ground are stringent.[53] And certainly the finality of judgments will not admit of an action to impeach a prior judgment merely because it was against the weight of the evidence,[54] or because the judgment is thought to be unjust, erroneous, and contrary to that which the court in which the independent action is instituted might have reached.[55]
>
> An independent action will not lie merely because the trial court failed to follow the instructions of the appellate tribunal.[56] Nor can it be successfully maintained where the present complainant negligently failed to press the matter in the original action;[57] or where he is guilty of laches in seeking relief from the original judgment.[58] Ordinarily a party seeking to impeach a judgment must make a showing that the merits lie with him.[59] And a court should not disturb rights of third persons vested or acquired in good faith reliance upon the judgment.[60] (Footnotes omitted.)

Turning first to the question of the timeliness of these suits, they appear to be barred by the statute of limitations, 28 U.S.C. § 2501, and by laches. All of the challenged events with the exception of one, which will be dealt with below, took place on or before 1964. According to *Japanese War Notes Claimants Assn.* v. *United States*, 178 Ct. Cl. 630, 373 F. 2d 356, *cert. denied*, 389 U.S. 971 (1967), the statute is tolled only if defendant concealed the cause of action and plaintiff was not aware of facts to put it on notice. Except as set forth hereinafter, whatever malfeasance petitioners

know of now, they knew on July 20, or October 7, 1964. No adequate excuse for eight years of inaction is offered. If they are lawfully in court now, they could have been here then. *Capoeman* v. *United States*, 194 Ct. Cl. 664, 440 F. 2d 1002 (1971). Thus lack of counsel cannot excuse the eight years of delay.

As to the specific allegations made in the petitions, we find them anyway insufficient to support action by this court under Rule 152(b). Both petitioners allege that attorneys for the defendant acted in bad faith during the negotiations for the settlement. The ICC Act clearly contemplates an adversary proceeding. The Government attorneys in presenting the facts in a light which favored their client's position were acting properly in their capacities assigned them under the Act. They had no duty to point out court precedents favorable to the Indians and acted properly in attempting to get a settlement at a low cost to their client. The Indians had their own able counsel.

Both petitioners challenge the activities of those Government officials who supervised the voting on the proposed settlement. In response, defendant has placed before the court the extensive findings developed in this case by the Indian Claims Commission. These findings indicate a most careful inquiry by the Commission into the circumstances of the settlement, as was natural and prudent in view of the vociferous opposition. Government officials involved acted so as to assure a fair hearing and an unbiased vote on the proposed settlement. The findings indicated that at the meetings preceding the voting, both those who favored the settlement and those who opposed it were given ample opportunity to state their positions. We are told in the findings that the attorneys for the Indians gave a fair and unbiased appraisal of the proposed settlement. Decisions as to the operation of the vote, specifically the inclusion of mail ballots, in some cases, were apparently made in the desire to give all eligible Indians a chance to state their assent or opposition to the settlement. The hearings after the vote, according to the findings were handled in such a manner as to give all sides a fair opportunity to be heard. It is true that the above referred to findings were developed by the ICC, a body whose actions are being challenged. However, in the face of those

findings the burden is on the petitioners to come forward with a specific prima facie case of wrongdoing. This they have failed to do. The ICC therefore benefits from the usual presumption that Government officials' actions are proper and lawful.

Finally, the activities of the Indians' lawyers are challenged. Again, the Commission's findings controvert these challenges. According to the findings, the attorneys involved gave a fair account of the proposed settlement prior to the votes being taken. Certain of the attorneys asked that mail ballots be used, but they did so only on the basis of the alleged best interest of their clients. While certain of the Pitt River petitioners attempted unsuccessfully to dismiss the Tribe's attorney and to replace him with another, the record indicates that these Indians had no standing to represent the Tribe in such a matter. The petitioners' complaints point up an area of possible conflict of interest on the part of an attorney who is handling a case that will take years to try and sees the possibility of an immediate settlement. The conflict may well exist, but there are safeguards, (here a vote by the Indians and under ICC supervision) designed to protect the clients' interests. Petitioners fail to show, in the face of the Commission's findings, that those safeguards did not operate.

Since petitioners have not met the requirements of a successful challenge to a judgment under Rule 152 as spelled out in MOORE's, either in terms of timeliness or as to unconscionability, their claims as to the 1964 judgment of the Commission must fail.

Petitioner Pitt River Tribe also raises a challenge to the 1968 Act which set up the Roll of the Indians who would be able to share in the settlement and provided that the cost of establishing that Roll would be subtracted from the settlement sum. They also claim damages resulting from the delay in payment caused by the making of the Roll. These claims unlike the ones above are not barred by the statute of limitations or by laches. They are also not claims for relief under Rule 152(b). They are claims which, if this court has jurisdiction over them at all, come under 28 U.S.C. § 1505.

These latter claims were not extensively briefed by the Pitt River petitioner. In response to them, defendant invites the

court's attention to a series of cases which speak of the extensive powers of Congress in making up Rolls and in appropriating sums of money to pay Indian tribal claims. In view of the powers of Congress in the area, this attack on its constitutional right to do what it did would have to rest on clearcut grounds unknown to us and not stated by petitioner. In light of the lack of an adequate exposition of these claims we dismiss them without prejudice, and without comment as to their merit.

Petitioners' claims attacking the 1964 judgment of the Indian Claims Commission are dismissed. Defendant's motions as to these claims are granted. Petitioner Pitt River Tribe's claim as to the 1968 Act of Congress is dismissed without prejudice.

APPENDIX B

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IN THE COURT OF CLAIMS OF THE

UNITED STATES OF AMERICA

PITT RIVER TRIBE, Plaintiff,	)	
vs.	)	NO.
UNITED STATES OF AMERICA, Defendant.	)	

PETITION TO FILE A BELATED APPEAL,
OR TO SET ASIDE OR MODIFY A JUDGMENT
OF THE INDIAN CLAIMS COMMISSION

* * * * *

COMPLAINT UNDER 28 U.S. CODE, SECTION 1505

I

The jurisdiction of the Court is derived from the Indian Claims Commission Act and 28 U.S. Code, Section 1505.

II

The entire first count of this pleading, with the exception of paragraphs I, II and the prayer, were filed with the Indian Claims Commission. By the Order (attached as Exhibit A) the Commission rejected the filing.

III

The Pitt River Tribe of Indians filed a claim with the Indian Claims Commission which was numbered Docket 347. The Indians of California filed claims with the Indian Claims Commission which were numbered Dockets 31 and 37.

IV

The Indian Claims Commission determined, in Dockets 31, 37 and 347, that the United States was liable to the particular Indian

groups involved. There then remained two issues: Damages and set-off.

V

At this stage, the Attorney General of the United States requested settlement negotiations in Dockets 31, 37, 347, 80 and 80d, (the latter two were filed by the Mission Indians). In the settlement negotiations, the Attorney General announced that the Government would pay $29.1 million dollars, and no more, for full settlement of these five dockets. This sum was obtained by calculating the land which was taken from the Indians to be worth 47¢ an acre on March 3, 1853, and then subtracting set-offs. The Attorney General's offer provided that all five Dockets had to be settled for this sum and all claims which were included, or could have been included, in these Dockets were settled.

VI

The Attorney General, in order to induce

the Indians to accept this settlement offer made certain fraudulent statements and representations. These statements were as follows:

VI(a)

On the Value of the Land

1. The Government, having in its files absolutely complete information on the value of Indian land selected certain rulings of the Court of Claims and the Indian Claims Commission and presented them to the Indians' attorneys as precedents, by which the value of California in 1853 could best be determined. No such complete information, or anything comparable, was available to the Indians.

These cases were deliberately selected by the Government because of their low value. A survey of all decisions evaluating Indian land in the Court of Claims and the Indian Claims Commission up to the time of the settlement negotiations shows

that the Government-selected cases were not typical and not precedential; and had a much lower value per acre than the surveyed cases had.

2. The Attorney General of the United States represented falsely to the Indians that the only way to determine the value of California in 1853 was to find certain precedential claims cases. The falseness of this statement is demonstrated by the following:

(a) The amount of gold which was known to be in the ground would have had more significance in establishing the value of California than any other factor. Somewhere around $2 billion dollars in gold was taken out of California, and well over $200 million of this was extracted before March 3, 1853, with very small production costs. The value of the land was around $20 per acre in gold alone.

(b) It was far from true that to appraise California land in 1853 a comparison with land values in other states had to be made. The most reliable possible appraiser, the California State Legislature, in 1852 appraised the 8-1/2 million most worthless acres in the state (the treaty lands to be given the Indians under the 18 unratified treaties) as worth $12 an acre. This fact was well known to the Attorney General.

(c) The Attorney General knew that the decisional law of the Court of Claims and the Indian Claims Commission determined valuation by what a purchaser would pay for it. By the Acts of March 3, 1851 and March 3, 1853, all Indian land was placed in public domain, where, by statute, it could not be sold for less than $1.25 per acre; if timber land it would be

$2.50 per acre. So, no purchaser could purchase the land involved in these Dockets for less than $1.25 per acre.

VI(b)

On the Elements of Damages

1. The Attorney General falsely represented that in the damages phase of this litigation, the only factual issue before the Commission would be the value of the land. He knew that there were other elements of damage which were clearly set out in the Indian Claims Commission Act, i.e., torts. He knew, from many Congressional hearings on the California Indian claim, that much the largest claim of any Indian Tribe or grouping which would be presented to the Commission was the claim of the California Indians for payment for the genocide which killed somewhere between 100,000 and 200,000 California Indians between 1850 and 1880, and resulted in child and adult slavery of tens of thous-

ands, and massacres, and starvation, and rape and kidnapping of Indian women and girls. He knew that the validity and massiveness of the claim was never denied by the Government.

2. The Attorney General concealed from the Indians the fact that they were entitled to payment for more than $200 million in gold which the Federal Government permitted to be stolen from Indian land before March 3, 1853.

3. The Attorney General concealed from the Indians the fact that they were entitled to be paid for the value of their fishing, hunting and gathering rights for the 110 years up to the settlement negotiations, and for an indefinite period in the future.

VI(c)

On Delay in the Litigation

1. The Attorney General advised the Indians, or at least permitted them to be

advised by their attorneys, without correction, that if the case were heard on the damages issue, it could take anywhere from 10 to 15 years for completion. He did not advise the Indians that such a delay could only come about if the Government deliberately slowed down the trial of the case, or permitted the Indians' attorneys to unconscionably delay. The Attorney General did not advise the Indians that if there were such a delay it would be strongly opposed by Congress, which had terminated the Commission's functions on April 10, 1967, approximately four years after the settlement talks. The Attorney General also declared, and permitted the attorneys for the Indians to declare without correction, that if a settlement were reached it would be possible for the Indians to get their money almost immediately. He knew that one of the most compelling arguments for settlement was the age of many of the

Indians and the length of time they had already waited. He did not advise them of the long delay which was quite reasonably to be expected. It is now over nine years since the settlement proposal, and the checks are far from being ready for distribution.

VI(d)

On the Amount of Individual Distribution

The Attorney General knew that one of the strong arguments for the settlement was the total sum that would be distributed to each individual on the list. He permitted attorneys for the Indians to promise payments in the neighborhood of $800, based upon the fact that there would be 36,000 (the then number) on the list. He did not advise the Indians that Congress, upon the urging of the executive department, might well (and, in fact, did), make a new list which was much larger. The present list is well over twice the size that

it was when this promise of $800 was made to the Indians.

VII

A tentative agreement to the proposed settlement was reached by the attorneys for the Indians and the Attorney General. Then a procedure recommended by the attorneys for the Indians and having the approval of the Attorney General, was adopted by the Commission. According to this procedure, there would be a vote in the Mission Tribe, to be conducted at several meetings. If, at these meetings the settlement was voted down, it would be conclusive; there was to be no mail ballot. If, voted up, then there would be a vote of the Pitt River Tribe at a meeting to be held in Alturas. If at that meeting the settlement was voted down, it would be conclusive, there would be no mail ballot. If voted up then it was to be submitted to a vote of the other California Indians

at meetings and by mail.

VIII

Prior to these meetings, at these meetings, and together with mail ballots, arguments in favor of the settlement were made by practically all of the Indians' attorneys. In their arguments, they presented to the Indians the above-stated fraudulent statements of the Attorney General, together with their approval of these statements. The character of these statements were such that they could, and did, account for the vote which was recorded by the Indian Claims Commission as approving the settlement. Without the fraud the settlement would have been rejected.

IX

Since the settlement was defeated at the Pitt River Tribal meeting in Alturas, the settlement failed and cannot be enforced. If it is not true that the settlement thus failed, as a matter of law, then the

settlement must still be voided because the procedures in the voting violated due process of law.

X

The approval of the settlement of the Indian Claims Commission, because it changed the rules after the game was played (in permitting a Pitt River mail ballot), violates the constitutional principle annouced in the Court of Appeals of the District of Columbia on the challenge to the McGovern slate in California. Applicable here is the expanded due process which the courts have fashioned for the special guardian-ward relationship between the Government and the Indians. The special elements in this case which require an even broader expansion of due process are (1) the unusual protection accorded Indians by Congress in creating the Commission's investigation Division, and (2) the unique difficulty of determining whether an

Indian Tribe understands and approves a settlement.

XI

Another due process denial was in the biased, slanted, pro-settlement activities of the BIA in its presentation to the Indians of the facts and arguments regarding the settlement. In the case of the decisive mail vote of the Pitt River Tribe, these procedures were especially harmful because the Indians who voted by mail ballot were confined almost exclusively, for their facts and argumentation, to the false presentation they received by mail from the BIA. Graphic, objective verification of the prejudicial effect of this biased, slanted procedure is in the great variation between the results when the tally of the mail ballots is compared with the tally of the meeting ballots in the Pitt River case and in the case of the Indians of California.

XII

In the conduct of the Pitt River vote, there was an irregularity so gross as to rise at least to the due process level and perhaps to the fraud level. It consisted of the BIA's sending out for the mail ballot at least 100 more ballots than there were Pitt River Indians eligible to receive them and to vote, by the BIA's own admission. This number was well in excess of the margin by which the Commission ruled the settlement to be approved by the Pitt River Tribe.

XIII

Another due process violation was in the total circumstances of the legal representation of the Pitt River Tribe. Its attorney, Louis Phelps, was retained by the Pitt River Tribal Council on behalf of the Tribe and the contract between him and the Tribe was approved, in accordance with the statutes, by the Secretary of the

Interior.

The first dissatisfaction of the Tribe with its attorney was expressed by the Tribe when Mr. Phelps, without prior consultation or approval of the Tribe, engaged in negotiations for a settlement with the Attorney General. In doing so he violated the express provision of his contract with the Tribe that he could not negotiate any settlement without their approval.

Before negotiating a settlement with the Attorney General, Mr. Phelps knew the position of the Tribe that it strongly opposed consolidation with any of the other cases. Such consolidation was part of the settlement.

After the settlement was negotiated with the Attorney General, Mr. Phelps did not report back to the Tribe or discuss the matter with them. Mr. Phelps agreed to the procedures by which the settlement

should be voted upon by the Indians without prior consultation with the Tribe.

Mr. Phelps made a presentation to the Alturas meeting which strongly supported the settlement and left out the arguments that were made by the Tribal Council and other members of the Tribe against the settlement.

Mr. Phelps, without consultation with the Tribe, met with the BIA and the Commission and the other lawyers, looking toward undoing the Alturas vote by conducting a mail ballot. Despite his knowledge that a majority of his clients vehemently opposed the settlement and felt there had been an expression of tribal views by the negative vote, Mr. Phelps wrote to the Commission and requested the holding of a mail ballot. The Commission granted his request.

Mr. Phelps sent a report along with the mail ballot, which contained misleading

and incomplete statements of the position of the Tribal Council, and of the ideas expressed at the meeting by tribal members. Mr. Phelps did not permit the Tribal Council to enclose a statement of its position in the letter containing the ballot, Phelps' argument and the erroneous BIA report of the meeting.

Mr. Phelps refused to protest or object to the fact that Indians who were not Pitt River Indians received ballots, some Pitt River Indians did not receive ballots and some people received several ballots.

XIV

The Commission decided to hold settlement-evaluation hearings. At the first of these Mr. Phelps appeared and argued for the settlement, but also asked the Commission to give the Pitt River Tribe a special hearing on its objection. This hearing was ordered to be held in Eureka, California.

XV

Upon the basis of its experience with Mr. Phelps the Tribe then concluded it was necessary to change attorneys. It therefore held a Tribal meeting, entered into a signed agreement with the firm of Melvin Belli, and asked that this contract be approved by the Interior Department. The Department refused to approve the change in representation. Mr. Belli appeared with about 300 of the Tribe's members at the Eureka hearing but was denied the right to participate by the Commission.

XVI

The Tribe expressed opposition to the settlement at the Eureka meeting and also at other meetings. At none of these meetings were the facts, and arguments against the settlement organized and prepared in the way that attorneys are able to do. On the serious, difficult and somewhat unprecedented legal issues there was no

presentation at all by the Indians. The witnesses against the settlement were bombarded with cross-examination by a number of experienced attorneys, and by members of the Commission. They had no lawyer to object to the questions or defend them in any way, even though cross-examination often extended into areas which would seem to be irrelevant, and intended only to provoke prejudice against them.

Spokesmen of the Pitt River Tribe and other Indians, when they attempted to cross-examine the witnesses who supported the settlement, were advised that only attorneys could cross-examine. Their attorney, Melvin Belli, was denied the right to cross-examine. This ban on cross-examination continued even when the settlement hearings went into the crucial area of misconduct by the BIA people who were conducting the elections, such as BIA people depositing ballots in the ballot box, or

sending out extra ballots, or not sending ballots to people who should have gotten ballots, etc.

XVII

When, at these hearings, doubt was cast on whether the Tribal Council was the bona fide Tribal Council and whether the Tribal Council represented the Tribe, Mr. Phelps stood silent, even though at the beginning of the Pitt River hearings, he had vouched for the representativeness of this same Tribal Council, and even though it was the same body that had entered into the contract with him. He permitted the Commission, without argument, protest or disagreement, to reach the conclusion that the Tribal Council had no right to represent the Tribe, and the Tribal meetings which were held to discuss the settlement were not properly representative of the Tribe.

XVIII

When the settlement hearings had been

completed the matter was argued, and there was no argument against the settlement, or its legality, or its fairness, or its intelligibility, because Mr. Phelps would not make such an argument. The Pitt River Tribe had an attorney willing to make this argument, but he was not permitted by the Commission to appear on its behalf.

XIX

The total conduct of the Government vis-a-vis the attorney-client relationship also amounted to class discrimination in violation of the Fifth Amendment. Had not Indians been involved, they would not have needed approval by the Government - and certainly not approval by their legal opponent.

XX

After the judgment the Pitt River Tribe, the claimant in Docket 347, had a legal and constitutional right to appeal to the Court of Claims and the United States

Supreme Court before the decision would become final. The finality of this decision had consequences far beyond its immediate and obvious effect. Several courts have since ruled that, the decision of the Commission approving the settlement, having become final because of a lack of an appeal, divested the Pitt River Tribe of its ancestral land. The Commission by its ruling that only Mr. Phelps could represent the Tribe before the Commission, since Mr. Phelps refused to file an appeal, deprived the Tribe of its constitutional right to appeal.

XXI

After approving the settlement, the Commission held a hearing to determine the fees to be allowed the attorneys for the Indians. Determination of these fees was left to the Commission by the contracts between the attorneys and the Indians. The attorneys sought a fee of 10 percent

of the $29,100,000. The Indians of California and the Mission Indians, and especially the Pitt River Indians, were opposed to the requested fee. Yet when the hearing was set to hear arguments for and against the proposed attorneys' fee no notice was given to the Mission Tribes, or the Pitt River Tribe, or to the organizations representing the California Indians, or to any individual Indians. Consequently, the Indians were not represented at the hearing, except by the attorneys who were requesting this large fee.

XXII

At the hearing it was discovered from testimony of, and cross-examination by, the Assistant Attorney General, that the total number of attorneys for the Indians was excessive and work was duplicated. It also appeared that a great deal of the work for which the attorneys sought compensation was competitive work in order to

permit one or another attorney to represent certain groupings of Indians, or all the Indians, which would be of no possible benefit to the Indians involved - but only to the lawyers in terms of fees. Nevertheless, the Commission approved the fee of 9 percent and entered a lawyer's fee judgment.

XXIII

No determination was made by the Commission, nor judgment entered, as to a proper and fair fee to be paid to Louis Phelps, attorney for the Pitt River Tribe. Instead, the 9 percent fee based upon the entire judgment was awarded to all the attorneys collectively, to be divided by the attorneys upon any basis, or none. By this procedure plaintiff was denied any opportunity to argue for a diminution of the fee of its attorney below the 9 percent level. Had it been given this opportunity it would have claimed misconduct of Mr. Phelps

and inadequacy of his representation. In addition to his conduct described above, it would have claimed, in violation of its interests and to its damage, he had (1) permitted a judgment to be paid to the individual tribal members instead of to the tribe, and (2) made impossible the payment of the judgment in whole or in part by the return of ancestral land, as was later done with approval of the Commission in the Taos and Yakima cases.

Furthermore, the failure to adjudicate the proper and fair attorneys' fee for plaintiff's attorney separately, resulted in plaintiff paying the fee, in part, of the attorneys who not only did not represent plaintiff but spent most of the time (for which they were paid by the Commission) litigating adversely to plaintiff in the Commission and in the Court of Claims.

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XXIV

The Government proposes to deduct, from the fund being held for the Indians flowing from this judgment, $475,000, which is the cost of preparing the roll to be made to distribute this judgment. The Indians of California and the claimants have never given authorization to the Government to reduce their shares in order to pay the costs of preparing the roll. Such authorization was not given in the judgment, nor in the proposed settlement that was purportedly approved by vote of the Indians. Under these circumstances there is no legal justification for withholding this $475,000 from the Indians.

XXV

As a matter of law the settlement in the sum of $29,100,000 was not adequate or fair to the Indians. As a matter of law, California had a value of at least $1.25 per acre on March 3, 1853. The support for

this proposition is two statutes passed by Congress which must be given the effect of a Statutory Res Judicata or Statutory Finding of Fact. These two statutes are the so-called California Jurisdictional Act, 25 U.S. Code 651, et seq., and its amendment which passed Congress but was vetoed by President Roosevelt. The first of these established the value on June 1, 1852 of the "Treaty Lands" (which were described by the President of the United States, in submitting the California Treaties to the Senate, as the most worthless land in California). The second of these determined for all of California a value of $1.25 an acre as of the same date.

XXVI

The claim of the California Indians on which this judgment was made dates back to March 3, 1853 and before. When the settlement was negotiated the claim was at least 110 years old. Beginning as early as 1920,

California Indians were trying to obtain from Congress the right to sue on this old claim, so that at the time the settlement was negotiated the efforts of the California Indians to sue were 43 years old. The Indians of California were, almost to a man and woman, terribly dissatisfied with the figure of $29,100,000. But they had waited too long and were told they would have to wait much longer. So when they were assured by the Government that the old people could get their money within a few months, the Indians very reluctantly voted for the settlement. Now, with the passage of over nine years and no payment yet, there is a new situation. The agreement, if any, to the settlement was based upon the fundamental mistake of law and fact, that the payment would be made within a short time after the settlement was approved. Therefore, the settlement and the Judgment based thereon,should be set

aside.

XXVII

The actions of the Government within the context of the relationship between the Government and the Indians and the public policy of the United States vis-a-vis the Indians violates the Fifth and Ninth Amendments, the Treaty of Guadalupe-Hidalgo, the public policy of the United States toward Indians, the decisional law of the United States in the area of Indian claims against the United States and Indian claims to land, and the purpose, intent and policy of the Indian Claims Commission as reflected in its statutory history.

XXVIII

The governing body of the Pitt River Tribe, its Tribal Council, never approved the Settlement; in fact, it opposed the Settlement. Petitioner is the Pitt River Tribe and the petition was filed by the

Tribal Council, acting for the Tribe. There could be no valid consent to the Settlement except by the Tribal Council, which did not consent.

XXIX

The land which was taken by the United States Government on March 3, 1853, did not belong to the individual members of the Tribe but to the Tribe -- which is the nature of Indian Title. The loss of land, for which the Judgment was intended to be compensation, was not by the individual members of the Tribe but by the Tribe. If there is to be payment of the Judgment, so far as Docket 347 is concerned, such payment must be made to the Tribe and not to its individual members, or else the Judgment is not satisfied.

XXX

The attorneys who are filing this petition have not heretofore appeared for plaintiff in this docket. They have been

authorized by plaintiff to file this petition on its behalf. They have no contract with plaintiff. Their representation has not been approved by the Department of the Interior, the Secretary of the Interior, or the Bureau of Indian Affairs. They are representing plaintiff without fee. If it be asserted that, though representing plaintiff without fee, their representation must first be approved by any Government agency, then Petitioner claims that such requirement of approval, under the circumstances of this case, constitutes a violation of the Fifth and Ninth Amendments of the United States Constitution and of the fiduciary relationship between the Indians and the Government of the United States.

XXXI

From 1966 to date the Pitt River Tribe, being without any funds with which to employ an attorney, has conducted an inten-

sive search for an attorney or attorneys who would represent the Tribe without fee in filing such a petition as this. Late in 1970 it succeeded in obtaining the first member of its legal staff. The time between then and now has been occupied with augmenting the legal staff and studying the files of the Indian Claims Commission, which study was made more difficult by the refusal of the former attorney of the plaintiff to turn over plaintiff's files and papers to its new counsel, requiring the Commission's files to be examined in the National Archives. This Petition is being filed at the first possible opportunity.

SECOND COUNT

I

There is incorporated in this Count all of the first Count,except paragraphs I and II.

//

II

The allegations incorporated in paragraph I establish that the Pitt River Tribe has a claim arising after August 13, 1946 under the Constitution, laws, treaties and Executive Orders of the President, and a claim cognizable in the Court of Claims even if claimant were not an Indian Tribe, band, or group.

WHEREFORE, PETITIONER PRAYS:

1. The Judgment of the Commission approving the Settlement be set aside.

2. The Judgment of the Commission as to damages be set aside.

3. The Judgment of the Commission as to attorney's fees be set aside.

4. As an alternative to 1, 2, and 3, plaintiff be permitted to appeal from the Judgment referred to above.

5. Proper damages be awarded plaintiff

///

///

under 28 U.S. Code, Section 1505.

Respectfully submitted,

/s/Aubrey Grossman

Aubrey Grossman
Attorney for Plaintiff

Dated: December 16, 1972.

APPENDIX C

AUBREY GROSSMAN
1095 Market Street, Suite 410
San Francisco, California 94103
Telephone: (415) 861-2630

Attorney for Plaintiff

IN THE COURT OF CLAIMS OF THE

UNITED STATES OF AMERICA

PITT RIVER TRIBE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO.
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

AMENDMENT TO PETITION
AND COMPLAINT

A new paragraph number XX(a) is hereby added to the Petition and Complaint.

XX(a)

Having made an appeal impossible by denying the Tribe an attorney, the Government then proceeded to consider the Settlement as having divested the Pitt River Tribe of its ancestral land. The Government's position is established by its letter of December 27, 1972 which is attached as Exhibit B.

Respectfully submitted,

/s/ Aubrey Grossman
AUBREY GROSSMAN
Attorney for Plaintiff

EXHIBIT B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington,D.C. 20240

December 27,1972

Dear Mr. Grossman:

This will acknowledge receipt of your letter of November 20, 1972, directed to Deputy Assistant Secretary William L. Rogers, in which you made demand on the Government on behalf of your clients, the Pitt River Tribe, for the return of their land. In light of the final determination in The Pitt River Indians of California, et al. v. The United States of America, 13 Ind. Cl. Comm. 369(1964), we cannot consider your demand.

Sincerely yours,

/s/Charles

Deputy Assistant
Secretary of the Interior

Mr. Aubrey Grossman
Attorney-at-Law
Room 410
1095 Market Street
San Francisco, California 94103

APPENDIX D

AUBREY GROSSMAN
1095 Market Street, Suite 410
San Francisco, California 94103
Telephone: (415) 861-2630

Attorney for Plaintiff

BRUCE R. GREENE
DAVID GETCHES
JOHN E. ECHOHAWK
GEORGE FORMAN

Of Counsel

IN THE COURT OF CLAIMS OF THE

UNITED STATES OF AMERICA

PITT RIVER TRIBE, Plaintiff,	)	
vs.	)	NO. 47-73
UNITED STATES OF AMERICA, Defendant.	)	

REQUEST FOR ORAL ARGUMENT OR,
IN THE ALTERNATIVE,
FOR PERMISSION TO REPLY TO THE
GOVERNMENT'S REPLY

IN THE COURT OF CLAIMS OF THE UNITED STATES OF AMERICA

PITT RIVER TRIBE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 47-73
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

REQUEST FOR ORAL ARGUMENT OR, IN THE ALTERNATIVE, FOR PERMISSION TO REPLY TO THE GOVERNMENT'S REPLY

We hereby request permission to make an oral argument before the Court - unless, of course, the Court has already decided, upon the basis of the briefs, to deny the Motion for Summary Judgment.

Should this request be denied, in that event we request permission to file a Reply to the Government's Reply.

The justification for these requests is (1) the overwhelming importance of the case to Plaintiff, (2) the necessity, in the unlikely event that the Plaintiff should lose on this Motion, that the Pitt River Tribe

should feel that it had been given every opportunity to present and argue for its position, (3) the profundity, the uniqueness, importance and difficulty of the legal questions which are involved.

We are now going to do something unusual, but is this not a very unusual case? We are going to offer some new evidence, which we are going to attach as Exhibit A. This has recently come to our attention. Its relevance is that, as everyone concedes, all the issues that we are attempting to present to the Court would have been presented had an appeal been filed within ninety days of the Commission's Judgment. As appears from Exhibit A, there would have been such an appeal, filed within the ninety days, except that the Plaintiff's opponent before the Commission used its legal powers to prevent Plaintiff from instituting such an appeal. We quote the significant part of Exhibit A.

"An order of 'Final Determination of Judgment' was issued by the Indian Claims Commission, Dockets 31, 37, 80, 80-D, and 347, on July 20, 1964. The final determination was reported to Congress in accordance with the A[illegible] of August 13, 1946 (60 Stat. 1049). Since the judgment in Docket No. 347 is final under Section 22 of the Indian Claims Commission Act, we see no tribal interest which could be served by approval of the proposed contract."

Respectfully submitted,

June 30, 1973.

EXHIBIT A

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

September 23,1964

Mr. Melvin M. Belli
Belli, Ashe and Gerry
Attorneys at Law
The Belli Building
722 Montgomery Street
San Francisco,California:

You submitted for approval to the Area Director, Sacramento, California, by letter dated August 18, 1964, signed by Mr. Frederick A. Cone, a copy of a contract alleged to have been entered into on August 16, 1964, by "the Tribal Council of the Pit River Indians, acting for and on behalf of the Pit River Tribe of Indians," and the law firm of Belli, Ashe and Gerry.

Your request for approval of the contract is denied because we are not convinced that the matter of your proposed tribal claims contract has been properly presented to and acted upon by the Pit River Tribe of Indians. This situation has resulted from your failure to meet the applicable requirements of Part 72 of Title 25 of the Code of Federal Regulations which were specifically called to your attention by our letter dated July 2, 1964. The meeting of the Pit River Indians held at Alturas, California, at which action was taken on the proposed contract was not called by a representative of this Bureau as required by Section 72.8 of Title 25, Code of Federal Regulations. Further, this

Bureau was never notified that a general council comprising all members of the Pit River Tribe was being called for August 16, 1964, or that the purpose of the meeting was the dismissal of the existing contract attorneys, the selection of other attorneys, and the selection of representatives of the Tribe to negotiate and execute a tribal claims contract.

Mr. Ike Leaf talked by telephone on August 6, 1964, with our Sacramento Area Office. He said that a meeting of the so-called eleven member tribal council was to be held at Alturas on August 16, 1964, for the purpose of discussing organization of the Pit River Tribe and invited the Bureau to send a representative. An article appearing in "The Sacramento Bee" on August 6, 1964, similarly stated a meeting of the "tribal council" would be held at Alturas on August 16 to discuss a constitution and bylaws. Mr. Leaf said that a copy of the proposed constitution and bylaws would be submitted to the Sacramento Area Office for discussion prior to an organizational meeting. No draft or copy of an organizational document has been submitted to the Bureau.

By letter dated August 8, 1964, Mr. Frederick A. Cone notified our Sacramento Area Office of the intention of your law firm to enter into negotiations with the Pit River Indians looking toward the retainer of your firm to represent them. Our Sacramento Area Office also received a resolution dated August 7, 1964, signed by the eleven members of the so-called "Tribal Council" stating their intentions of retaining you and your law firm to represent the Pit River Indians. The resolution clearly indicated that the purpose of such proposed employment is to enable you to

take action with respect to Docket 347 of the Indian Claims Commission.

An order of "Final Determination or Judgment" was issued by the Indian Claims Commission, Dockets 31, 37, 80, 80-D and 347, on July 20, 1964. The final determination was reported to Congress in accordance with the Act of August 13, 1946 (60 Stat. 1049). Since the judgment in Docket No. 347 is final under Section 22 of the Indian Claims Commission Act, we see no tribal interest which could be served by approval of the proposed contract.

In view of the foregoing, it is unnecessary to consider the form of that contract, of which only a copy was submitted to this Bureau rather than the original and four copies as called for by Section 72.19 of Title 25, Code of Federal Regulations. The copy of the contract which you submitted to our Sacramento Area Office is returned herewith disapproved.

Sincerely yours,

Commissioner

Enclosure

cc: Area Director, Sacramento
Indian Claims Commission
Mr. Phelps
Mr. Ike Leaf.

APPENDIX E

IN THE UNITED STATES COURT OF CLAIMS

PITT RIVER TRIBE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 47-73
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MOTION FOR SUMMARY JUDGMENT

Kent Frizzell
Assistant Attorney
General

Ralph A. Barney
Attorney

IN THE UNITED STATES COURT OF CLAIMS

PITT RIVER TRIBE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 47-73
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MOTION FOR SUMMARY JUDGMENT

The defendant, by its Assistant Attorney General, moves the Court to dismiss the above-entitled and numbered cause of action on the grounds that:

1. The Court has no jurisdiction over the subject matter of this suit.

2. The action sought to be maintained herein is res judicata by reason of the judgment of the Indian Claims Commission in Clyde F. Thompson, et al. v. United States, July 20, 1964 (13 Ind.Cl.Comm.369) and the payment thereof by the Congress by the Act of October 7, 1964, 78 Stat.1023 1034.

3. The case is not timely filed within the provisions of Title 28 U.S.C. §2501, and this Court is without jurisdiction thereof.

A Memorandum of Points and Authorities is hereto attached and made a part of this motion.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General

RALPH A. BARNEY
Attorney,
Attorneys for Defendant

By_____
Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

Statement

While the plaintiff herein originally tendered to the Clerk of this Court a petition similar to the present one, this Court, by order of October 10, 1972 rejected the petition and directed the Clerk to refuse to file it. The Court has now, by its order of February 2, 1973, directed that the petition be accepted as though it were a petition pursuant to section 1505, Title 28 U.S.C., and placed on the Court's general jurisdiction docket.

Notwithstanding this order, the defendant alleges, as set out in the Motion for Summary Judgment, that this Court is without jurisdiction and that the petition should be dismissed.

Although the prayer is generally considered to be no part of the allegations of a petition, it may be looked at to determine the nature of the relief sought. Schaefer

v. Gunsburg, 246 F.2d 11 (C.A. 9,1957). This is particularly necessary in this case because the petition fails to comply with Rule 35 of this Court which requires the petition to set forth "A clear and concise statement of the facts on which each claim is based, including the facts upon which the court's jurisdiction depends, the time and place where the claim arose, and the items and amounts claimed"(emphasis ours). For the most part, the so-called allegations are merely conclusions of the pleader and do not comply with the rules, nor do they add anything to the effect of the pleading. Creek Nation v. United States, 97 Ct.Cl. 591, 599-600 (1942), aff'd 318 U.S. 629 (1943), reh. den. 319 U.S. 980. Nor are such conclusions admitted by this Motion for Summary Judgment. Creek Nation v. United States, 92 Ct.Cl. 346, 351 (1941), cert. denied 314 U.S. 667.

From the prayer of this petition, it

appears that plaintiff seeks to have this Court

1. set aside the judgment of the Indian Claims Commission of July 20, 1964 under which the Pitt River Tribe and the other "Indians of California" were awarded a judgment against the United States of $29,100,000 (13 Ind.Cl.Comm.369);

2. set aside the judgment of the Commission for damages;

3. set aside the judgment of the Commission awarding attorneys' fees (16 Ind.Cl. Comm. 631 (1966); and

4. as an alternative to the above, the plaintiff be permitted to appeal the judgment of the Commission of July 20, 1964 (and presumably the award of attorneys' fees);

5. that this Court, in effect, retry the litigation involving the "Indians of California", including the Pitt River case, and award "proper damages" under Title 28 U.S.C.

§1505.

Argument

1. Jurisdiction

Although the Court has permitted the filing of this petition under its general jurisdiction in Indian cases under section 1505 of the Code, this fact does not confer jurisdiction to entertain and adjudicate the claim if it is otherwise lacking. As the Supreme Court said in Matson Navigation Co. v. United States, 284 U.S. 352, 359 (1932), aff'g 72 Ct.Cl. 210 (1931):

> *** The burden rested upon petitioner to allege and prove a cause of action within the jurisdiction of the Court of Claims. [Citation omitted.]

This is a threshold question which must be determined before reaching the merits of the case. Gutierrez v. Waterman S.S.Corp., 373 U.S. 206, 209 (1963).

Section 1505 under which this Court has permitted the petition to be filed reads as follows:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13,1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

This section clearly does not provide this Court with jurisdiction to set aside the judgments of the Indian Claims Commission either as to the settlement or the attorneys' fees, nor would it permit this Court to award damages to the plaintiff.

In Carney v. United States, 199 Ct.Cl.__, 462 F.2d 1142 (No.529-71, decided July 14, 1972), this Court was asked to set aside a judgment of the United States District Court of Utah on much the same type of allegations contained in the present petition. The grounds were "fraud on the court and misconduct of plaintiffs' then attorney,"

it being alleged that as a result the plaintiffs were awarded only $20,000 though they then claimed their property was worth $16,000,000 and before this Court alleged it was worth $56,100,000 plus interest. The Court noted that absent Rule 152(b), the Government's motion to dismiss would certainly have been a good defense on the grounds of res judicata and collateral estoppel, citing, as its authority, Advertising Checking Bureau, Inc. v. United States, 141 Ct.Cl.430, 159 F.Supp. 330(1958).

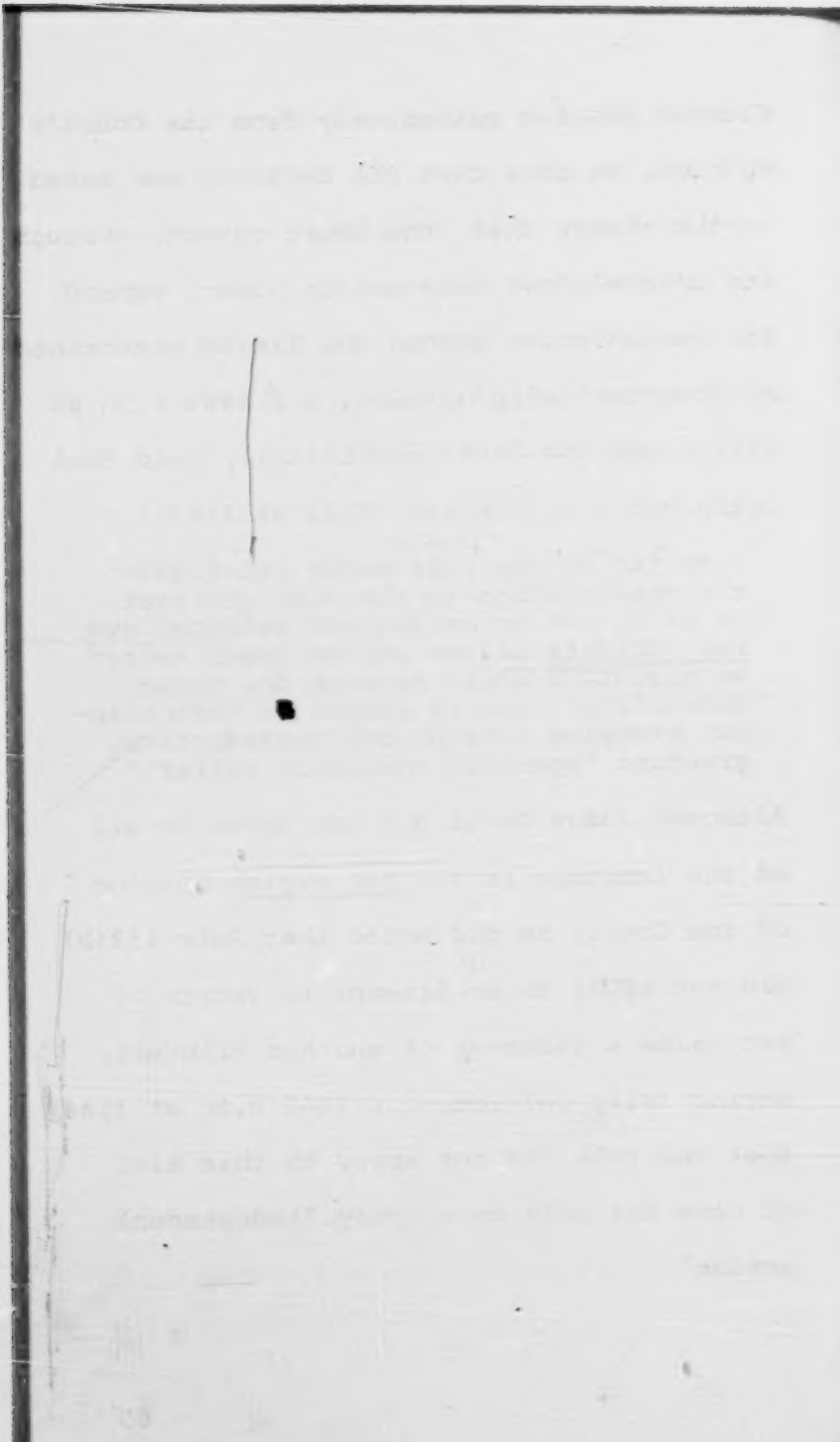
However, the Court considered the matter as if its Rule 152(b) had been invoked which authorizes the Court "to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." Having considered the matter carefully, this Court said (slip opinion,p.2) (462 F.2d 1142,1144):

> ***We conclude we lack jurisdiction to entertain such an "independent action."

Without quoting extensively from the Court's opinion, we note that the decision was based on the theory that "the court cannot, through its acknowledged rule-making power, expand its jurisdiction beyond the limits prescribed by Congress"(slip opinion, p.2)(462 F.2d at 1144), and the Court specifically held that (slip opinion, p.4)(462 F.2d at 1143):

> So far as the suit would relitigate the condemnation in the Utah District it is barred by collateral estoppel and res judicata unless we can grant relief as plaintiff would have us do, under Rule 152(b), and we cannot do that without stepping outside our jurisdiction, granting "specific equitable relief."

Although Judge Davis did not agree to all of the language in the per curiam opinion of the Court, he did agree that Rule 152(b) did not apply to an attempt to vacate or set aside a judgment of another tribunal, saying (slip opinion, p.6)(462 F.2d at 1146) that the rule did not apply to this kind of case but only to a truly "independent action"



challenging one of our own orders, judgments or proceedings. This reading seems to me called for by our past practice (cited by the court) as well as by the serious doubt (discussed in the court's opinion) as to our statutory jurisdiction to entertain an "independent action" to set aside the judgment of another court. The result, in my view, is that plaintiffs are barred at the threshold by the prior Utah judgment, and cannot avail themselves, in this court, of the charge of fraud since, as I see it, Rule 152(b) applies only to a truly "independent action" to set aside a judgment of our own. This is not such an "independent action"; there is no "independent" action at all, and the suit does not involve a judgment of this court.

A decision by the Indian Claims Commission is in the same category. As this Court said in Suquamish Tribe v. United States, 197 Ct.Cl. 775, 777(1972):

> ***The Commission is an independent body with power to "hear and determine", not a mere arm of this court or an advisory board.***From the beginning, we have followed that concept, refusing to treat appeals a trials de novo or to consider the proceedings before the Commission as mere preliminaries to a "real trial" here.*** It follows that claimaints cannot wait to present their full claim until they reach this court.

Under the decision in Carney, this Court has no jurisdiction to set aside the judg-

challenging one of our own orders, judgments or proceedings. This reading seems to me called for by our past practice (cited by the court) as well as by the serious doubt (discussed in the court's opinion) as to our statutory jurisdiction to entertain an "independent action" to set aside the judgment of another court. The result, in my view, is that plaintiffs are barred at the threshold by the prior Utah judgment, and cannot avail themselves, in this court, of the charge of fraud since, as I see it, Rule 152(b) applies only to a truly "independent action" to set aside a judgment of our own. This is not such an "independent action"; there is no "independent" action at all, and the suit does not involve a judgment of this court.

A decision by the Indian Claims Commission is in the same category. As this Court said in Suquamish Tribe v. United States, 197 Ct.Cl. 775, 777(1972):

> ***The Commission is an independent body with power to "hear and determine", not a mere arm of this court or an advisory board.***From the beginning, we have followed that concept, refusing to treat appeals a trials de novo or to consider the proceedings before the Commission as mere preliminaries to a "real trial" here.*** It follows that claimaints cannot wait to present their full claim until they reach this court.

Under the decision in Carney, this Court has no jurisdiction to set aside the judg-

ment of the Indian Claims Commission. This is additionally true under section 22 of the Indian Claims Commission Act (25 U.S.C. §70u) which provides:

> (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

Under the decision of this Court in Assiniboine Indian Tribe v. United States, 128 Ct.Cl. 617 (1954), cert.den. 348 U.S.863, the judgment of the Commission having been reported to Congress and paid by the Appropriation Act of October 7, 1964, 78 Stat. 1023, 1034, is final (cf. Pope v.United States, 323 U.S. 1, 9 (1944) and cannot be reviewed by this Court. The petition should

be dismissed.

An additional reason is that this Court has no jurisdiction to grant the relief prayed for. Here the relief sought is to set aside the judgment of the Commission under the provisions of section 1505. This the Court may not do. In Klamath and Modoc Tribes, et al. v. United States, 174 Ct.Cl.483(1966), this Court explored the reaches of its jurisdiction under that section. Although in that case the ground for "specific relief" was for an accounting, the principle involved is the same. Here the plaintiff seeks the specific equitable relief of setting aside the judgment of the Commission as a prelude to a retrial in this Court of the amount of "damages" which they claim they should have received. In denying the request for an accounting, the Court pointed out (pp. 486-487):

> It is settled beyond peradventure that the United States may not be sued without its consent. Moreover, this court cannot freely entertain suits of diverse

and sundry natures simply because the United States is said to be the offending party. Our jurisdiction is limited by the strictures imposed by 28 U.S.C. §1491, popularly referred to as the "Tucker Act", and by the provisions of Section 24 of the Indian Claims Commission Act, 28 U.S.C. §1505, which extend to Indian tribes, band, and groups the rights of other Americans to sue their Government under the Tucker Act.

In plaintiffs' first theory of consent, noted above, they assert that it was the intent of Congress in passing Section 24 of the Indian Claims Commission Act to do something more than extend the jurisdiction of this court under the Tucker Act to claims brought by Indian tribes on causes of action accruing after the enactment of the Indian Claims Commission Act. After examining the legislative history and plaintiffs' arguments pertinent thereto, we conclude that the "something more" is missing from the legislative record. The court is well aware of the purposes behind the enactment of the Indian Claims Commission Act, see e.g., Creek Nation v. United States, 168 Ct. Cl. 483(1964). Congress recognized its duty to clean the Augean stables of past generations and correct, in part, wrongs accorded the Indians by giving them a fair day in court to seek redress of their legitimate grievances. In order to do so, it created a commission vested with the authority to hear and decide not only legal claims presented by the Indians but those of an equitable and moral nature as well. Thus, in Section 2 of the Indian Claims Commission

> Act, 25 U.S.C. 70a, Congress expressly included in the jurisdiction of the Commission (in subparagraphs (1) and (2)) claims "in law or equity" and (in subparagraph (3)) claims "cognizable by a court of equity". The breadth of this jurisdictional grant is in sharp contrast with the language of 28 U.S.C. §1505, which merely gives to Indian tribes the same rights to sue in this court as are granted to others under our general jurisdictional statute, 28 U.S.C. §1491.
>
> *** Our general jurisdiction under the Tucker Act does not include actions in equity.*** [footnote omitted.]

After quoting rather extensively from the legislative history of the Indian Claims Commission Act (pp.488-489), the Court said (pp.489-490):

> We think Section 24 of the Act does exactly what Congressman Jackson said it was intended to do; namely, it gives to Indian tribes the same right to sue in this court as is granted to others under the Tucker Act.***

As we have pointed out above, this Court has no jurisdiction under the Tucker Act to set aside a judgment of a different tribunal (Carney v. United States, supra). Since the rights of Indian tribes under section

1505 are the same, and no greater, than any other litigant, it follows that this Court has no jurisdiction to vacate or set aside the judgment of the Commission.

2. Statute of Limitations

Although we believe that the above discussion is sufficient to justify the dismissal of the petition, we also contend -- if it is necessary to do so -- that this action is barred by the 6-year statute of limitations imposed by 28 U.S.C. §2501. As set out in the petition, the contentions are that the $29,100,000 judgment of the Commission was obtained by fraud. The conduct alleged must of necessity antedate the rendition of the judgment dated July 20, 1964 (13 Ind.Cl.Comm1369). Thus the judgment was rendered more than 8 years previous to the filing of the petition herein.

The statute of limitations is jurisdictional and it cannot be waived except by an

act of Congress. Major C. Todd, Jr.,et al. v. United States, 155 Ct.Cl. 87, 93, 292 F.2d 841 (1961).

3. Res Judicata

Although plaintiff never specifies what judgment it seeks to have this Court set aside, it is plain from the petition that it is the judgment for $29,100,000 entered by the Commission on July 20, 1964 and which has been paid by the appropriation of that sum by the Act of October 7, 1964, 78 Stat. 1023, 1034. As set forth in the petition, the Pitt River Indians were a party to this litigation and judgment.

This judgment and payment are res judicata, and the petition should be dismissed. Western Cherokee Indians, et al. v. United States, 116 Ct.Cl. 665,677 (1950),cert.den. 340 U.S. 903. Blackfeet and Gros Ventre Tribes v. United States, 127 Ct.Cl. 807, 815-818(1954), cert. den. 348 U.S. 835. As this Court said in Carney (slip opinion,

p.2): "there can be no doubt these are good grounds [for dismissal] absent plaintiff's invocation of F.R.C.P. 60(b)"[Ct.Cl.Rule 152(b)].

As there held, Rule 152(b) is not available to set aside judgments of another court. Under the doctrine of res judicata and collateral estoppel, the petition here under consideration should be dismissed.

4. Belated Appeal

It seems axiomatic that this Court may not authorize a petition to file a "Belated Appeal". Section 20(b) of the Indian Claims Commission Act (25 U.S.C. §70s) provides in material part:

> ***At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims***.

A timely notice of appeal is jurisdictional and it may not be waived (Reed v. People of State of Michigan, 398 F.2d 800,

801 (C.A. 6, 1968))nor extended by order of the Court (Kapsalis v. Wilson, 380 F.2d 365, 366 (C.A. 9, 1967)). In the absence of a timely notice, this Court has no jurisdiction of any appeal. County of Imperial, State of California v. United States, 348 F.2d 904, 905 (C.A. 9, 1965).

Conclusion

In summary, the petition in this case should be dismissed for the following reasons: (1) the decision of the Indian Claims Commission in Clyde F. Thompson, et al. v. United States, 13 Ind.Cl.Comm. 369 (1964), which included the Pitt River Tribe, is res judicata; (2) the judgment has been paid by the Act of October 7, 1964, 78 Stat. 1023; (3) this Court has no jurisdiction to set aside the judgment of $29,100,000 rendered by the Commission; (4) this Court would have no jurisdiction to award "proper damages" to plaintiff; (5) even if we were to assume (which we do

not) that there was any cause of action arising in favor of the Pitt River Indians as alleged in the petition, that cause of action accrued no later than July 20, 1964 and is barred by the statute of limitations applicable to this Court; and (6) this Court has no jurisdiction to permit the filing of a "Belated Appeal" herein.

Dated this day of February 1973.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General

RALPH A. BARNEY
Attorney,
Attorneys for Defendant

By_____
Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1706

PITT RIVER TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 485 F. 2d 660. The opinion of the Indian Claims Commission is reported at 13 Ind. Cl. Comm. 369.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. On January 10, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 16, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims properly declined to reopen a 1964 judgment of the Indian Claims Commission.

2. Whether the Court of Claims properly dismissed (without prejudice) petitioner's claim that the Act of September 21, 1968, 82 Stat. 860, providing for the establishment of a roll of recipients for the 1964 judgment, was unconstitutional.

STATUTES AND RULE INVOLVED

25 U.S.C. 70(u) provides:

> (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

28 U.S.C. 1505 provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties

of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. 2501 provides in pertinent part:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Rule 152 of the United States Court of Claims reads in pertinent part as follows:

(b) * * * On motion * * * the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to enter-

tain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. * * *

The pertinent provisions of the Act of September 21, 1968, 82 Stat. 860, are set forth at Pet. 8-11.

STATEMENT

The Court of Claims here rejected petitioner's 1972 petition to set aside a 1964 judgment of the Indian Claims Commission and dismissed, without prejudice, petitioner's challenge of the Act of September 21, 1968, providing for the establishment of a roll of beneficiaries of the judgment (Pet. App. A).

The Pitt River Tribe filed a timely claim with the Indian Claims Commission pursuant to the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70 *et seq.)* for compensation for lands in California taken from them. *Pitt River Indians of California* v. *United States,* 7 Ind. Cl. Comm. 815. The Commission, after a preliminary hearing, found that bands of the Pitt River Tribe had held aboriginal title to 11 tracts of land in California, *id.,* at 844-847, and that their title was extinguished on March 3, 1853, *id.* at 847-848, 862.

On July 20, 1964, the Commission approved a settlement of land claims in California entered between the United States and several claimants including the Pitt River Tribe. *Thompson* v. *United States,* 13 Ind. Cl. Comm. 369, 385-388, 512. On the basis of this settlement the Commission entered a final judgment for $29,100,000 in favor of the petitioner and others. *Id.* at 543a-543b. This final determination was reported to Congress by the Commission pursuant to 25 U.S.C. 70t in July 1964, and by Act of October 7, 1964, 78 Stat. 1023, 1033-1034, Congress appropriated funds for payment of the judgment.

By Act of September 21, 1968, 82 Stat. 860, Congress provided for the compilation of a roll of Indians to share in the settlement, and the funds were subsequently distributed.

In September 1972, the petitioner presented to the Court of Claims petitions to invalidate the judgment of the Indian Claims Commission and for leave to file a belated appeal from the judgment of the Commission. These petitions were rejected for filing, one by the Clerk and the other by order of the court. Similar petitions filed with the Indian Claims Commission were denied by order of the Commission (Pet. App. A, 2). In December 1972, the petitioner filed in the Court of Claims a Petition to File a Belated Appeal, or to Set Aside or Modify a Judgment of the Indian Claims Commission (Pet. App. B), and for the first time invoked the court's jurisdiction under 28 U.S.C. 1505, which gives the court jurisdiction over Indian claims accruing after August 13, 1946. The court permitted this petition to be filed pursuant to that statute (Pet. App. A, 2).

The government filed a Motion for Summary Judgment (Pet. App. E) which the court granted in its opinion and judgment of October 17, 1973 (Pet. App. A). The court rejected petitioner's request to reopen the 1964 judgment of the Indian Claims Commission, finding that petitioner's reasons for reopening the case failed to meet the requirements of Court of Claims Rule 152, which corresponds to Rule 60(b), Fed. R. Civ. P. The court dismissed without prejudice petitioner's claims under the Act of September 21, 1968, *supra*, for want of an adequate exposition of those claims (Pet. App. A, 9-10).

ARGUMENT

1. The decision of the Court of Claims not to reopen the judgment of the Indian Claims Commission approving the settlement made by petitioner is correct and does not warrant further review. The court ruled that under the standards of its Rule 152(b) (which is substantially identical to Rule 60(b), Fed. R. Civ. P.) petitioner failed to satisfy "the burden * * * to come forward with a specific prima facie case of wrongdoing" that would have justified this belated reopening (Pet. App. A, 9). The court also noted (Pet. App. A, 7-8) that all of the challenged events, except the enactment of the Act of September 21, 1968, providing for a roll for distribution, occurred in or before 1964. This suit was brought some eight years later, and the court noted that "[n]o adequate excuse for eight years of inaction is offered." *Id.* at 8.[1] We add that the issues raised before the Court of Claims were essentially the same issues raised and ruled upon by the Indian Claims Commission when it approved the settlement in the first place. *Thompson* v. *United States, supra,* 13 Ind. Cl. Comm. 369, 385-392, 399-418, 434-443, 449-450, 454-455, 486-507, 512, 537. The Court of Claims, in these circumstances, acted within the proper scope of its discretion in refusing to reopen the case. See, interpreting Rule 60(b), Fed. R. Civ. P., *Ruiz* v. *Hamburg-American Line,* 478 F. 2d 29, 31 (C.A. 9); *Wilkin* v. *Sunbeam Corp.*, 466 F. 2d 714, 717 (C.A. 10), certiorari denied, 409 U.S. 1126; *Martella* v. *Marine Cooks and*

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[1]The court also noted (Pet. App. A, 6-7) that the claims to reopen the suit are barred by its statute of limitations, 28 U.S.C. 2501 (see p. 3, *supra*).

Stewards Union, 448 F. 2d 729, 730 (C.A. 9), certiorari denied, 405 U.S. 974.[2]

2. The court held that petitioner's challenge of the 1968 Act was not barred by laches and that the Court of Claims has jurisdiction to hear it (Pet. App. A, 9). But the court found that petitioner had not set forth any "clearcut grounds" on which the Act could be held unconstitutional and that the court knew of none. "In light of the lack of an adequate exposition of these claims," the court dismissed them "without prejudice, and without comment as to their merit" (Pet. App. A, 10). Since petitioner may still recast its petition and arguments as to these claims and present them to the Court of Claims pursuant to 28 U.S.C. 1505, there is no reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2]Whether the Court of Claims had jurisdiction apart from the limitations problem to reopen a final decision of the Claims Commission on which Congress had acted is not free from doubt. Compare *Carney* v. *United States,* 199 Ct. Cl. 160, 462 F. 2d 1142; but see Pet. App. A, 5-6.